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POSTDATED CHECKS: AN OLD PROBLEM WITH A NEW SOLUTION IN THE REVISED U.C.C.

Vincene Verdun*

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I. INTRODUCTION

The problems encountered by drawers of postdated checks (PDCs) are exemplified in the recent experiences of a law professor/colleague of mine. She recounted the following story involving PDCs and a daycare center which provided services to two of the professor's children. The daycare center required payment of tuition for a full year in advance. In order to accommodate the professor, the daycare center accepted nine personal checks, each constituting one-ninth of the total tuition, one payable each month for nine months. This arrangement worked well for the first four months. In the fifth month, the daycare center deposited checks five through nine. The checks were honored by the professor's bank and depletion of the account caused a number of other checks to be dishonored. The daycare center claimed inadvertent error, but refused to refund the money. The bank supported its refusal to credit the account for the amount of the prematurely paid PDCs by asserting the rights of the daycare center. The bank claimed that payment of the checks satisfied a legitimate obligation of the professor to the daycare center so the professor had suffered no loss.¹ The professor's budget was left in a shambles, and the professor found little solace in the potential claim for breach of contract against the daycare center or for wrongful dishonor against the bank.² The law professor, like many consumers, chose not to absorb the time and expense of litigation, even though she may have been entitled to have her account recredited and to damages caused by the wrongfully dishonored

1. The bank's argument was based upon U.C.C. § 4-407, which gave the bank the right to subrogate to the rights of the daycare center. *See infra* notes 40-61 for discussion of U.C.C. § 4-407 subrogation rights. However, the professor and the daycare center had a payment agreement which provided for monthly installments. The payments represented by checks six through nine were not yet due pursuant to the terms of that agreement. Therefore, the bank would have been subrogated to rights that were not yet due and would not have had a valid defense against the professor's claim of improper payment under U.C.C. § 4-401.

2. U.C.C. § 4-402(b) provides:

A payor bank is liable to its customers for damages proximately caused by the wrongful dishonor of an item. When the dishonor occurs through mistake liability is limited to actual damages proved. If so proximately caused and proved damages may include damages for an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case.

checks.³ Things could have been worse for the professor. If one of the payees of the dishonored checks had filed a complaint with the appropriate law enforcement agency, the professor could have been arrested and charged with a crime.⁴ The frustrating experiences of this colleague reflect those of many drawers of PDCs.

PDCs have presented a host of problems for consumers, bankers, and lawyers that seem to defy judicial resolution.⁵ The same questions have been presented repeatedly, and the courts have not provided a consistent analysis of the issues presented.⁶ Some of the problems have been definitional. Is a PDC a check?⁷ Is it a negotiable instrument?⁸ Other problems have been practical. Do PDCs constitute consideration for contract purposes? Are payor banks⁹ liable when PDCs are paid

3. U.C.C. § 4-402.

4. Drawing a check when there are insufficient funds in the drawee's account to cover it is an offense included in the criminal codes of each state. See *infra* notes 111-21, for discussion of the criminal law problem.

5. American Agric. Chem. Co. v. Scrimger, 100 A. 774 (Md. 1917) (postdated checks are legal instruments); Briand v. Wild, 268 A.2d 896 (N.H. 1970) (negotiability of a check not affected by postdating); Philadelphia Life Ins. Co. v. Hayworth, 296 F. 339 (4th Cir. 1924) (a postdated check need not be presented on its date); Kuflik v. Vaccaro, 170 N.Y.S. 13 (1918) (a postdated check is a negotiable instrument); Matathias v. Bel-Mar Lab., Inc., 222 N.E.2d 736 (N.Y. 1966) (postdated checks are merely promissory notes); Allied Color Corp. v. Manufacturers Hanover Trust Co., 484 F. Supp. 881 (S.D.N.Y. 1980) (a postdated check is not a check but a draft); Stag Co. v. Union Bank, 201 Ill. App. 510 (1922) (bank paying postdated check prior to its due date is liable to drawer); Wilson v. Mid-West State Bank, 186 N.W. 891 (Iowa 1922) (a certified check postdated three weeks contains notice of defect upon its face; a purchaser before maturity is not a holder in due course).

6. For example, in Kuflik v. Vaccaro, 170 N.Y.S. 13 (1918), and Matathias v. Bel-Mar Lab., Inc., 222 N.E.2d 736 (N.Y. 1966), decided years later, the courts upheld the validity of postdated checks. However, in Kuflik they were described generally as negotiable instruments, while in Matathias postdated checks were characterized as promissory notes. In these cases the difference in characterization did not affect the outcome; however, such distinctions sometimes confuse the bench and bar. This may account for why issues surrounding postdated checks which should be noncontroversial after a number of decisions keep coming up in appeals.

7. This question was raised as recently as 1978 in Australia where the court stated that a postdated cheque is not a cheque within the meaning of the Bills of Exchange Act. Brien v. Dwyer, 141 C.L.R. 378 (Austl. 1978). The Australian Bills of Exchange Act is patterned after the English act bearing the same name. The United States Negotiable Instruments Law (N.I.L.) and its successor the Uniform Commercial Code (U.C.C.) were patterned after England's Bills of Exchange Act.

8. This issue was debated by the courts after the adoption of the Negotiable Instruments Law despite the fact that prior to the passage of that act the negotiability of postdated checks was firmly established in case law. See Kuflik v. Vaccaro, 170 N.Y. S. 13 (1918); First Nat'l Bank of Trinity, Tex. v. McKay, 521 S.W.2d 661 (Tex. Ct. App. 1975) (a check is a negotiable instrument in spite of its having been postdated).

9. U.C.C. § 4-105(3) defines payor bank as the bank that is the drawee of a draft. Although not specifically defined in the U.C.C., the drawer is the person who writes the check, and the

before the stated date? If the banks are liable, what is the measure of damages? Is a bank required to honor a PDC at all? These are just a sampling of the perplexing questions that arise in connection with PDCs. Unfortunately courts and commentators have been unable to resolve the confusion and uncertainty that surround PDCs, which leaves consumers, like the law professor in the example above, in a quandry.

In addition to, or perhaps as a result of the legal issues surrounding the use of PDCs, there is widespread disagreement concerning whether PDCs have legitimate commercial uses. Barkley Clark said the use of PDCs has a slightly unsavory aroma.¹⁰ On the other hand, some courts have described PDCs quite favorably.¹¹ This disparity between court and commentator is fairly reflective of the ambivalence with which PDCs are received within the legal profession. The simple truth is that PDCs are usually a poor substitute for some other negotiable instrument that provides better protection for the interests of the parties involved. The law professor could have paid the daycare center with a promissory note calling for monthly installment payments. The daycare center could have discounted the note and received cash immediately for the value of the note. Instead, the PDCs were used to facilitate the short-term extension of credit¹² to the exclusion of more traditional devices¹³ which are available to achieve the desired objective, postponement of payment. If a promissory note of credit agreement is

payee is the person to whom the check is written. See WHALEY, PROBLEMS AND MATERIALS ON NEGOTIABLE INSTRUMENTS 22-23 (1988).

10. BARKLEY CLARK, THE LAW OF BANK DEPOSITS COLLECTIONS AND CREDIT CARDS (3d ed. 1990).

11. *People v. Gerber*, 453 N.Y.S.2d 998 (1982) (New York courts have a longstanding policy of encouraging the use of postdated checks in the commercial world); *Mohawk Bank v. Broderik*, 13 Wend. 133, 135 (N.Y. 1834) (drawing of postdated checks is an everyday occurrence in our commercial cities); *Clarke Nat'l Bank v. Bank of Albion*, 52 Barb. Ch. 592, 600 (N.Y. 1868) (postdated checks are instruments often used and their nature and character well understood by bankers and the trading community). See also *Bowen v. Newell*, 8 N.Y. 190, 195 (1853).

12. See, e.g., *Andrew & Wilson v. Blachly*, 11 Ohio St. 89, 91 (1860) ("These postdated checks are evidently but another mode of attaining the same end which was sought to be attained in the use of the instrument sued on in this case, viz: the postponement of the day of payment . . .").

Problems have arisen when PDCs have been used without the consent of the creditor to make installment payments pursuant to credit arrangements. See *Lake Village Implement Co. v. Cox*, 249 Ark. 733, 461 S.W.2d 108 (1970); *Vermeer Sales & Serv. v. Elec. Sales & Serv.*, 385 So. 2d 305 (La. Ct. App. 1980); *Phil-Co Feeds v. First Nat'l Bank in Havre*, 777 P.2d 1306 (Mont. 1989).

13. The list of alternative methods of deferring payment, in addition to promissory notes, includes credit cards and credit agreements.

used, provisions for default, confession of judgment, interest, payment of attorney's fees, etc., can be included. Since a PDC contains only an order to pay a specified amount on the stated date, the instrument provides little assistance to the attorney or the court in the attempt to sort out the rights and obligations of the parties. Given such inadequacies, one would suspect that the use of PDCs would be limited to fairly unsubstantial transactions between parties lacking business acumen. Surprisingly, that has not been the case. In fact, the sophistication of the parties in the reported cases involving PDCs suggests that PDCs are a respected commercial instrument, widely accepted and commonly utilized.¹⁴

Undoubtedly, PDCs are most frequently used in a number of undocumented transactions that do not involve attorneys, come fair weather or foul. The local daycare center or private school may accept PDCs as installment payments for tuition. The small retailer may accept PDCs as payment for goods or services. A good neighbor, friend, or acquaintance may be willing to accept a PDC in exchange for goods or services or as payment for a personal loan.¹⁵ Bill collectors¹⁶ have a

14. *Starboard Tack Corp. v. Meister*, 303 N.W.2d 38 (Mich. Ct. App. 1981) (PDCs used to make payments into an escrow account); *Pace v. Empire Distrib., Inc.*, 347 S.E.2d 724 (Ga. Ct. App. 1986) (PDC used by liquor retailer to pay account).

In *Miller v. First State Bank*, 551 S.W.2d 89 (Tex. Ct. App. 1977), the bank had the debtor tender several PDCs as installment payments to accompany a promissory note. The transaction was quite sophisticated as evidenced by the fact that the face amount of the PDCs included interest payments calculated from the transaction's consummation.

In *Overton v. Washington Nat'l Ins. Co.*, 260 A.2d 444 (R.I. 1970) and *Brand v. International Investors*, 521 P.2d 423 (Okla. Ct. App. 1974), insurance companies used PDCs as part of a payment plan for their customers. The customers issued twelve PDCs as installment payments for the annual policy premium. The insurance companies deposited the checks as they matured. Both parties derived some benefit from the use of PDCs in these transactions. The bank and the insurance companies did not have to send out bills or reminders to the customer that a payment was due, which saved them personnel time and cut expenses. The customer did not have to remember to write checks and deliver them as the installment payments came due.

In *Smith v. Gentilotti*, 359 N.E.2d 953 (Mass. 1977), a father gave his son a PDC in 1969 with a maturity date in 1984. The PDC contained an acceleration clause which provided that the funds to pay the PDC should be taken from the father's estate if the father died prior to the maturity date of the PDC. As fate would have it, the father's demise was prior to 1984 and the son made a claim against the father's estate for the amount of the check. The court held that the estate was required to pay the check since it could not establish a valid defense against it.

15. *Rogus v. Continental Illinois Nat'l Bank & Trust Co.*, 281 N.E.2d 346 (Ill. App. Ct. 1972). Rogus lent \$18,000 to Blanding and received promissory note and PDCs as payment. Blanding died before checks matured. Rogus sued on the note.

16. Debt collection agencies may save money and possibly eliminate the need to make further collection efforts by using PDCs. In the event the PDC is dishonored, it may be easier to sue on the instrument than on the underlying obligation. See U.C.C. § 3-802. Bill collectors are regu-

longstanding practice of accepting PDCs from debtors as payment for delinquent accounts. In developing countries that do not have the modern financial institutions like credit cards, automatic electronic funds transfers,¹⁷ or margin trading in an active options market,¹⁸ PDCs provide a functional alternative.

It is my undocumented opinion that PDCs are most frequently used by lower and middle class consumers as a means of managing their cash flow. The stated dates on the checks coincide with paydays. Drawers of PDCs either cannot afford to pay an attorney to design a more traditional instrument to defer payment, like a promissory note, or the transaction is of such a relatively small magnitude that legal expenses are unjustified.

This article will provide a better understanding of PDCs and suggest resolutions to the problems that impede their usefulness. The first part of the article explores and evaluates the problems peculiar to PDCs under current law. The second part of the article reviews the revisions of the Uniform Commercial Code (U.C.C.) and discusses how the revisions affect the problems surrounding PDCs.

lated in their use of PDCs by the 1978 Fair Debt Collection Practice Act, 15 U.S.C. §§ 1601-1693, which prohibits agencies from accepting checks postdated by more than five days unless the agency notifies the debtor in writing, at least three days and not more than ten days, before it intends to deposit the check. 15 U.S.C. § 1692 (f)(a)(2)(1988).

17. Merchants in some developing countries, Chile for example, use PDCs as a substitute for credit cards which are still in their infancy there. Shopkeepers allow customers to pay by monthly installments against the guarantee of PDCs. This is a risky practice for the customer since the shopkeepers can cash the checks before the agreed upon date. See *Chilean Banks Recover and Diversify*, EUROMONEY, March 1988, at 10. It is illegal in Chile to cash checks prior to the stated date. Furthermore, the penalty for issuing a check without sufficient funds is instant jail.

18. The 1982 crisis in Kuwait's stock market was largely attributed to that country's postdated check market. Kuwaiti speculators wrote \$14 to \$25 billion worth of PDCs to pay for stocks. This is how the scheme worked:

The holder of, for example, KD1 million worth of stocks estimated that they would be worth in one year, say KD2 million. He then found a purchaser and received from the latter a check dated a year hence for the total amount—the KD2 million. The seller then deposited the check or disposed of it at a friendly bank at a discount.

The problems occurred when a high percentage of the PDCs bounced in a short period of time, leaving a number of banks and other losing holders literally holding the baggage. The government had to determine whether and how to bail out the stock market and the thousands of affected investors. In the end, corporate holders of the PDCs lost more than seventy-five percent of the asset value of the PDCs carried on their books and hundreds of defaulters had bankrupt estates heavily monitored by the government. See *Stock Market Update: Guidelines on Postdated Checks*, 7 MIDDLE EAST EXECUTIVE REPORTS 17, 18 (Jan. 1984); *Kuwait Currency Devaluation (But They Thought about It)*, 6 MIDDLE EAST EXECUTIVE REPORTS 4 (Feb. 1983).

II. PROBLEMS CREATED BY THE USE OF POSTDATED CHECKS

Premature payment is the common theme for most of the issues involving PDCs. Drawers issue PDCs to postpone payment, and when their accounts are debited earlier than anticipated, losses result. As in the case involving the law professor and the daycare center, parties and their attorneys will attempt to ferret out their relative rights and responsibilities using the U.C.C. as the primary source of law. This section identifies the problems encountered by the parties to transactions involving PDCs and discusses their various rights and obligations.

A. What is a Postdated Check?

Code definitions of PDCs have been plagued with ambiguity.¹⁹ The U.C.C., its predecessor the Negotiable Instruments Law²⁰ (N.I.L.), and England's Bills of Exchange Act²¹ (B.E.A.) which served as a model for the N.I.L. all describe checks, with minor variations, as drafts drawn on a bank and payable on demand.²² According to these statutes, negotiable instruments, including checks, can be antedated or postdated.²³ The U.C.C. provides that postdated demand instruments

19. The court in *Allied Color Corp. v. Manufacturers Hanover Trust Co.*, 484 F. Supp. 881, 883 (S.D.N.Y. 1980), grappled with the definition of a PDC. The court stated that a postdated check presented for payment prior to the stated date is a "demand item" within the meaning of U.C.C. § 4-302(a). Such an item is not a "check" as defined by § 3-104(2)(b) but rather is a draft under § 3-104(2)(a). However, such a check is clearly an "item" as used by § 4-104(1)(g). While a "demand item" as used by § 4-302(a), is nowhere defined in the U.C.C., the class of "demand items" appears to be broader than the class of items "payable on demand," a determination supported both by § 3-114(2), which appears to contemplate the existence of instruments "payable on demand" that are not in fact payable on demand until after a future date, might be termed "demand instruments" and so would include postdated checks; and by § 3-122(1) which also seems to contemplate the existence of "demand instruments" which include instruments that do not become "payable on demand" until after a specified date sometime after the date of issue.

The court rejected the contention that a PDC was not a check but a note in *In re Paraleo 42 Corp.*, 18 B.R. 433 (Bankr. S.D. Fla. 1982). *But see* *Matathias v. Bel-Mar Lab., Inc.*, 222 N.E.2d 736 (N.Y. 1966) ("postdated checks are merely promissory notes").

20. See FREDERICK K. BEUTEL, *NEGOTIABLE INSTRUMENTS LAW V* (7th ed. 1948). "The Negotiable Instruments Law is based upon and largely copied from the English Bills of Exchange Act, a codification of the law of England as to bills of exchange, promissory notes, and checks, which was drawn by Judge Chalmers and enacted by parliament in 1882."

21. Bills of Exchange Act, 1882, 45 and 46 Vict., c.61.

22. U.C.C. § 3-104(2)(b) defines a check as a draft drawn on a bank payable on demand. N.I.L. § 185 provides that a check is a bill of exchange drawn on a bank and payable on demand. The B.E.A. § 73 describes a check as a bill of exchange drawn on a banker, payable on demand.

23. U.C.C. § 3-114 provides that "[t]he negotiability of an instrument is not affected by the fact that it is undated, antedated or postdated." Furthermore, "[w]here an instrument is antedated or postdated the time when it is payable is determined by the stated date if the instrument

should be paid on the stated date.²⁴ Instruments payable on a stated date are payable on or after the stated date.²⁵ These code provisions, both applicable to PDCs, present a dilemma: how can an instrument be both payable on demand and on or after a stated date?²⁶ Instruments payable on demand are payable whenever the holder decides to present them for payment. If PDCs are payable on or after a stated date,²⁷ they are not "payable on demand"; thus PDCs violate a fundamental condition in the U.C.C. definition of "check."²⁸ A functional definition can be derived by combining these two provisions: a PDC is a draft drawn on a bank, payable on demand on or after the stated date. As a result of the vagueness in the definition, courts and attorneys have to grapple with the definition of PDCs in a way that would not be necessary if the U.C.C. provided a clear and concise definition.²⁹

As one would expect, the courts in other countries whose laws

is payable on demand or at a fixed period after date." U.C.C. § 3-114(2). Similarly, N.I.L. § 12 provides that "[t]he instrument is not invalid for the reason only that it is antedated or postdated, provided this is not done for an illegal or fraudulent purpose." B.E.A. § 13 provides that "[a] bill is not invalid by reason only that it is antedated or postdated, or that it bears date on a Sunday."

24. U.C.C. § 3-114(2).

25. *Allied Credit Corp. v. Manufacturers Hanover Trust Co.*, 494 F. Supp. 881 (S.D.N.Y. 1980) (U.C.C. § 3-114(2) appears to contemplate the existence of instruments payable on demand that are in fact not payable on demand until "after" a future date).

26. In *Kuflik v. Vaccaro*, 170 N.Y.S. 13 (1918), decided soon after the adoption of the N.I.L., the court stated that a PDC is a negotiable instrument under the act. In his concurrence, Judge Mullan argued that a PDC was not a negotiable instrument under the N.I.L., being neither payable upon demand or at a fixed date, in accordance with § 23 or § 26 of the N.I.L. Judge Mullan stated that a PDC is not a check because it is not payable upon demand and not a bill of exchange payable upon demand or at a fixed future date. Since it did not fit within any of the definitions of instruments covered by the act, the judge concluded that PDCs were nonnegotiable under the N.I.L., despite the fact that under pre-N.I.L. law, PDCs were accepted as negotiable. See *BEUTEL*, *supra* note 20, at 341-43. See also *Triphonoff v. Sweeney*, 130 P. 979 (Or. 1913); *Albert v. Hoffman*, 117 N.Y.S. 1043 (1909).

27. Ordinary checks are payable within a reasonable time after issue. U.C.C. § 3-503(2) provides:

In the case of an uncertified check which is drawn and payable within the United States and which is not a draft drawn by a bank the following are presumed to be reasonable periods within which to present for payment or to initiate a bank collection: (a) with respect to liability of the drawer, thirty days after date or issue whichever is later; and (b) with respect to the liability of an indorser, seven days after his indorsement.

See *Philadelphia Life Ins. Co. v. Hayworth*, 296 F. 339, 343 (4th Cir. 1924).

28. U.C.C. § 3-104(2)(b).

29. In *People v. Gerber*, 453 N.Y.S.2d 998 (N.Y. Crim. Ct. 1982), the court stated: "Nor does the U.C.C. provide a clear definition of a postdated check except that § 3-114 of the U.C.C. says that the negotiability of an instrument is not affected by the fact that it is postdated."

evolved from the British Commonwealth³⁰ are also fumbling around trying to determine how to treat PDCs. A court in New South Wales recently dealt with the issue of whether a PDC was a check.³¹ In Australia, the legal characterization of PDCs was still unsettled and the subject of a hot judicial debate³² in a 1978 case which overruled a case decided in 1895 which held that the true date of a PDC was the date of its issue.³³ If the "true date," which means maturity date or the date upon which a PDC is properly payable,³⁴ of a PDC is the date of issue, bankers could pay PDCs without regard to their stated date, contrary to common practice in the United States, England, and Australia at the time.³⁵ The earlier case and its unorthodox holding apparently did not affect the established banking practice in Australia of paying PDCs

30. A description of the British Commonwealth countries and the relationship of English law is outside of the scope of this article. See *Report of Inter-Imperial Relations Committee of Imperial Conference of 1926*, BRITISH PARLIAMENTARY PAPERS, Command No. 2768, 21 AMERICAN JOURNAL OF INTERNATIONAL LAW 21 (1927) for description of the commonwealth, its development and the application of British law to commonwealth countries.

31. In *Hodgson & Lee Property Ltd. v. Mardonius Property Ltd.*, 78 A.L.R. 573 (Austl. 1986), the appellate court overruled the district court's ruling that postdated cheques were actually bills of exchange, payable otherwise than on demand, and as such could not be sued upon without proof of presentment. With respect to PDC, the court of appeals stated, "[t]he postdated cheques are not bills of exchange payable at some future time, but remained cheques within the meaning of the act, payable on demand on or after the due date arrived." Undoubtedly, the lower court classified the instruments as bills of exchange, but not cheques, because postdated "cheques" cannot be payable on demand, which is part of the definition of cheque. See B.E.A. *supra* note 21, § 73.

32. For a concise essay on postdated cheques in Australia, see Craigie, *Post-Dated Cheques*, 11 AUSTRALIAN BUSINESS LAW R. 107 (1983).

33. *Brien v. Dwyer*, 141 C.L.R. 378 (Austl. 1978), overruled an earlier case *MaGill v. Bank of North Queensland*, 6 Q.L.J. 262 (Austl. 1895), which raised some serious doubts over the legal characterization of PDCs. *MaGill* decided that the true date of a PDC was the date of its issue:

Now a valid bill must in law have some date. Its validity is not affected by the wrong date being written upon it, or by its having no date so written. By holding that the true date of the bill is the date of its 'issue' as defined by the Act, all these provisions are reconciled. And I think this is the necessary construction of the provisions of the Act to which reference has been made. The true date of the bill or cheque in question was therefore the day when it was issued by the plaintiff.

The "Act" referred to above is the Bills of Exchange Act of 1884 (Qld) which was patterned after and is essentially the same as The United Kingdom Act of 1882. See Craigie, *supra* note 32, at 107. The "provisions" referred to define bill of exchange and cheque, and provide for maturity of a bill, completion of undated bills, and validity of undated, antedated or postdated bills.

34. See *infra* notes 40-61 and accompanying text (discussion of properly payable rule and its application to PDC).

35. The holding was rejected by courts in New Zealand and Canada, respectively. See *Pollock v. Bank of New Zealand*, 20 N.Z.L.R. 174, 179-81 (P.C. 1901); *Keyes v. Royal Bank of Canada*, 3 D.L.R. 161, 165 (1947).

only after their stated dates.³⁶

The United States along with a host of other former British colonies, including the British Commonwealth countries, drafted and adopted laws patterned after the B.E.A., thus casting PDCs into the abyss of vagueness written into that act. Over a half century and many controversial court cases later, drafters of the U.C.C. did not find it necessary to add clarity to the definition of PDC and pretty much left the substance of the N.I.L. definition of PDC intact. Currently, the National Conference of Commissioners on Uniform State Laws (NCCUSL)³⁷ has adopted a draft of revisions to Articles 3 and 4 of the

36. See, e.g., *Brien v. Dwyer*, 141 C.L.R. 378, 399 (Austl. 1978) (Jacobs, J., dissenting). See also Craigie, *supra* note 32, at 111.

The court in *Brien* cleared up the controversy, created by *MaGill*, over the maturity date of PDCs by acknowledging that PDCs are payable at a future date. However, concurring Judge Aickin went on to classify PDCs as valid instruments, but not cheques:

No doubt a postdated cheque is a valid instrument. However, it is not a 'cheque' within the meaning of the Bills of Exchange Act which by section 78(1) defines a cheque as a 'bill of exchange drawn on a banker payable on demand'. It is, I think, clear that a post-dated cheque is a bill of exchange payable at a future date.

141 C.L.R. at 407-08.

Craigie, an authority on Australian commercial law, argued that refusing to accord PDCs the status of checks created problems for bankers in Australia. The Bill of Exchange Act provides protections to bankers in § 65 (forged instrument), § 80 (stale check), § 81(b) (determination of authority to pay by notice of customer's death), § 86 (paying crossed checks to a banker), § 88B (paying indorsed check to a banker), § 88D (collecting banker) and § 88E (lien on unindorsed check) that apply only when bankers deal with checks. Since the court said PDCs were not checks, it is Craigie's contention that the protections do not apply to PDCs.

In his attempt to sort out the state of the law in Australia, Craigie examined the treatment of PDCs in England. He found that well into the second half of the nineteenth century bankers in England had an established custom of not paying PDCs which were presented prior to their date. According to Craigie, that practice found its origins in early stamp duty legislation which imposed heavy penalties on the use of PDCs. The practice continued after the stamp act legislation was repealed and became a common provision in the banker-customer contract. Thus, although PDCs were recognized negotiable instruments at law, it was common banking practice to treat them otherwise. Craigie found that this state of affairs prevailed up until the time that Chalmers drafted the Bills of Exchange Act. Upon review of Chalmers' writings prior to drafting the Bills of Exchange Act, Craigie concluded that "Chalmers found the law on post dated cheques to be in a somewhat equivocal state, and that it was allowed to remain in that state after the passing of the Act." Craigie, *supra* note 32, at 111.

37. The purpose of the NCCUSL was to promote uniformity in the law amongst states on subjects as to which uniformity was desirable and practical. It grew out of an American Bar Association Committee in 1889. By 1912 all states appointed commissioners, which currently range in number from 1 to 9. The NCCUSL appoints drafting committees of 5 to 9 members to prepare drafts of legislation which must eventually receive the approval of the NCCUSL and be adopted by the state legislatures. See BENFIELD & JENNER, *The Process of Changing the U.C.C.*, ALI-ABA COURSE OF STUDY, THE EMERGING NEW U.C.C. (Sept. 7-9, 1989).

The final draft of revisions to Articles 3 and 4 of the U.C.C. were approved by the NCCUSL on July 13, 1990 [hereinafter "Final Draft"].

U.C.C.³⁸ The draft legislation will be presented to state legislatures throughout the country for expeditious adoption. The revised Articles 3 and 4 add an element of clarity to the definition of PDC and will be discussed in Part III of this article.³⁹

B. The Properly Payable Rule

Although the U.C.C. uses permissive language in § 4-401, payor banks are required to pay checks that are properly payable and the bank must precisely follow the instructions of the customer.⁴⁰ If the bank fails to follow the customer's instructions, the bank could be liable to the customer for the amount of the check and possibly for damages for wrongful dishonor.⁴¹ When the customer postdates a check, the customer has instructed the bank not to pay the check until the stated date, and if the bank pays the check before the stated date the bank must put the money back into the customer's account.⁴² Since PDCs are not properly payable until their stated date,⁴³ banks are exposed to liability to the customer for losses resulting from paying PDCs prior to such date in two ways: (1) if the customer experiences a loss because the premature payment precluded the customer from giving the bank a timely stop-payment order on the PDC⁴⁴; and (2) if other checks, presented after the account was depleted from the payment of

38. The subjects of Articles 3 and 4 of the U.C.C. are negotiable instruments, bank deposits, and collections, respectively.

39. See *infra* notes 122-27.

40. U.C.C. § 4-401 provides: 1) As against its customer, a bank may charge against his account any item which is otherwise properly payable from that account even though the charge creates an overdraft.

It is implicit that the bank cannot charge items against the customer's account that are not properly payable, like PDCs that are presented prior to their stated date. If a charge is unauthorized, it follows that the depositor has a valid claim to the amount of the charge. *But cf.* Stone & Webster Eng'r Corp. v. First Nat'l Bank & Trust Co., 184 N.E.2d 358 (Mass. 1962).

41. U.C.C. § 4-402(b), *supra* note 2.

42. WHALEY, THE LAW OF CHECKING ACCOUNTS (1990) (available in Ohio State Univ. Law School Library or through Commercial Law Lectures, Inc.).

43. See U.C.C. § 3-114(2), *supra* note 23.

44. U.C.C. § 4-303 provides that a stop-payment order comes too late if it is received after the bank has paid the item or settled for the item without a right to revoke settlement. U.C.C. § 4-403 provides:

(1) A customer may by order to his bank stop payment of any item payable for his account but the order must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it prior to any action by the bank with respect to the item described in 4-303.

If the bank pays a PDC prior to its stated date, the customer/drawer loses the opportunity to make a timely stop-payment order.

the PDC, were dishonored. The two hypotheticals below are illustrative.

Illustration 1

Chris Customer issued a \$200 check on January 1, 1990 dated February 15, 1990 to Paul Payee as payment for a used waterbed. Payee and Customer agreed that if the waterbed leaked Payee would return the check and Customer would return the bed. Payee indorsed the check to Ivy Indorsee who paid Payee \$175 on January 15, 1990. Ivy deposited the check into her personal checking account on January 16, 1990, and Ivy's bank forwarded the check for collection.⁴⁵ Customer's bank overlooked the date on the check, paid the item on January 17, 1990 and debited Customer's account for \$200. Customer filled the waterbed on January 20, 1990 and finding that it leaked, immediately informed Paul of her intent to return the bed and pick up the check. Paul informed Customer that the check had been indorsed over to Ivy. Customer called her bank and demanded an immediate stop payment⁴⁶ on the check only to be informed that the check had already been paid.

Illustration 2

Customer wrote a \$200 check payable to Peter Payee on March 1, 1990 dated March 15, 1990. March 14 was Customer's payday, and Customer anticipated that she would not have sufficient funds to cover the check and other outstanding checks prior to her payday. Peter Payee deposited the check into his checking account on March 3, 1990 and Peter's bank forwarded the check for collection. Customer's bank paid the check on March 4, 1990 and subtracted \$200 from Customer's account balance. On March 7, 1990 Customer's bank returned a \$50 check payable to the electric company due to insufficient funds in Customer's account. On March 9, 1990 Customer's bank returned a \$100 check payable to Aetna Ins. Co.

In both Illustrations Customer's bank should not have paid the

45. A network which includes the Federal Reserve Banks, local and regional clearing houses, and banking institutions make up the bank collection system. The system is regulated by U.C.C. Article 4, Federal Reserve Board Regulation J, 12 C.F.R. part 210, and The Expedited Funds Availability Act, 12 U.S.C. §§ 4001-4010. A check passes from the bank where it is deposited, the depository bank, to one or more intermediary or collecting banks which often include at least one Federal Reserve Bank, and is finally presented to the drawee/payor bank for payment. For general discussion of the check-collection process, see WHALEY, *supra* note 9, at 247-86 (1988).

46. U.C.C. § 4-403, *supra* note 44.

PDC when presented and had no right at the time of presentment to charge the check against Customer's account.⁴⁷ The U.C.C. established the rights of the customer and the bank with a two-part adjustment,⁴⁸ described by the court in *Siegel v. New England Merchant's Bank*⁴⁹ as follows: "The depositor has a claim against the bank for the amount improperly debited from its account, and the bank has a claim against the depositor based on the subrogation of rights of the payee and other holders. The bank may assert its rights defensively when its depositor brings an action for wrongful debit."⁵⁰

The first question in applying the two-part test is whether Customer has a claim against the bank, which would make the bank liable to Customer. Second, it must be determined if Customer would be unjustly enriched if the bank is required to credit Customer's account for the entire \$200. If the bank's payment discharges a legal obligation of Customer or establishes a right in favor of Customer, it would be unfair to allow Customer to retain such benefits without paying for them. The U.C.C. provides for those occasions that might result in unjust enrichment in § 4-407.⁵¹ The practical effect of U.C.C. § 4-407 is that the bank will only have to pay Customer if the bank caused the loss, and even then the bank will not have to pay if the bank can find a prior

47. *Siegel v. New England Merchant's Bank*, 437 N.E.2d 218, 220 (Mass. 1982). The bank paid a postdated check before maturity and deducted the amount of the check from the depositor's account. When the customer learned of this, he informed the bank that the check was postdated and asked the bank to stop payment on the check. When the bank refused to restore the funds, the customer brought an action for wrongful debit of his account. The court ordered that the funds be restored, subject to the bank's subrogation to the rights of prior holders. *Id.* See also *Smith v. Gentilotti*, 359 N.E.2d 953 (Mass. 1977). *Peck v. Franklin Nat'l Bank*, 4 U.C.C. Rep. Serv. 861 (N.Y. App. Div. 1967), overrules *Dousmanis v. Colonial Bank*, 235 N.Y.S. 489, *aff'd*, 240 N.Y.S. 874 (1929), to the extent that *Dousmanis* held that a depositor had an unfettered right to recover from the bank for paying a postdated check before its date. No subrogation rights were asserted by the bank in *Dousmanis*, a pre-U.C.C. case.

48. *Siegel*, 437 N.E.2d 218, 221 (1982).

49. 437 N.E.2d 218 (1982).

50. *Id.* at 221.

51. U.C.C. § 4-407 provides:

If a payor bank has paid an item over the stop payment order of the drawer or maker or otherwise under circumstances giving a basis for objection by the drawer or maker, to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the item, the payor bank shall be subrogated to the rights (a) of any holder in due course on the item against the drawer or maker; and (b) of the payee or any other holder of the item against the drawer or maker either on the item or under the transaction out of which the item arose; and (c) of the drawer or maker against the payee or any other holder of the item with respect to the transaction out of which the item arose.

party with a valid claim against Customer. The bank can assert such prior party's rights against Customer.⁵²

In Illustration 1, Customer issued the PDC anticipating that the check would not be cashed if the waterbed leaked. Furthermore, since the waterbed did leak and Customer subsequently attempted to stop payment prior to the stated date on the check,⁵³ the bank's premature payment caused a loss to Customer. Unfortunately for Customer, if the bank can find a prior party, such as a holder or a holder in due course,⁵⁴ with a valid claim against Customer, the bank still wins.

Since Ivy Indorsee paid value for the check, if Ivy 1) had no knowledge that Customer could bring the waterbed back in the event that it was faulty, or 2) any other notice that would alert Ivy that there may be a claim against the instrument,⁵⁵ Ivy may be a holder in due course.⁵⁶ The bank could step into Ivy's shoes and use Ivy's rights against Customer to make a claim for payment⁵⁷ to prevail against Customer. Should there be a defect in the rights of Ivy against Customer, the bank could step into the shoes of the depositary bank, Ivy's bank.⁵⁸ The subrogation rights in U.C.C. § 4-407 increases the likeli-

52. For an excellent concise treatment of § 4-407 subrogation rights as they pertain to PDCs see WHITE & SUMMERS, *UNIFORM COMMERCIAL CODE* 659-61 (2d ed. 1980) [hereinafter W&S].

53. If customer had waited until after the stated date to attempt a stop-payment the loss would have resulted even if the bank had refused to pay the item until the stated date. The premature payment, in such a case, is not the cause of the loss.

54. U.C.C. § 1-201(20) defines holder as:

"'Holder' means a person who is in possession of a document of title or an instrument or a certificated investment security drawn issued or endorsed to him or his order or to bearer or in blank."

"'Holder In Due Course' is defined in U.C.C. § 3-302 as:

(1) A holder in due course is a holder who takes the instrument

(a) for value; and

(b) in good faith; and

(c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person."

See W&S, *supra* note 52, at ch. 14, for extensive treatment of the subject.

55. For a discussion of the effect that knowledge that the instrument was postdated has on holder in due course status see *infra* notes 102-09.

56. U.C.C. § 3-302, *supra* note 54. A holder in due course takes the instrument free from all claims to it and all defenses of any party with whom the holder has not dealt with a very limited list of exceptions that, generally, includes infancy, incapacity, duress, illegality, fraud in factum, and bankruptcy discharge. See U.C.C. § 3-305, *infra* note 102.

57. This is a right not a claim. Ivy has been paid so Ivy is not making any claims; however, if Ivy would have a right to make a claim if Ivy had not been paid, the bank can assert that right.

58. See U.C.C. §§ 4-208 and 4-209 to determine the extent that the depositary bank has given value for purposes of establishing holder in due course status.

hood of success for the bank when customers, like Chris Customer in Illustration 1, seek reimbursement for the amount of the item. According to White and Summers, "while postdated checks may be technically not properly payable, as a practical matter the payor bank will often prevail."⁵⁹

Banks may not be as likely to prevail when the customer seeks damages for wrongful dishonor of checks that were not paid due to depletion of the account resulting from the premature payment of the PDC.⁶⁰ It stands to reason that if the account balance reflected the appropriate amount, the checks would not have been dishonored and therefore the dishonor was wrongful. If the customer can demonstrate an injury then the customer should recover. According to U.C.C. § 4-402, the damages must be actual, proximately caused, and proved; damages for arrest or prosecution or other consequential damages are recoverable. That language most certainly would include, in Illustration 1, the returned check fees charged by Customer's bank against Customer's account when the checks were returned. Fees for returned checks charged Customer by the payees are also covered. Customer's right to recover is not limited to fees, but may include other damages as long as they are actual, proximate, and proved.⁶¹

In Illustration 2, the bank wrongfully dishonored checks made payable to the electric company and the insurance company. If electrical service was discontinued as a result of the bounced check, Customer could prove consequential damages such as reconnection fees or loss of electrical service and all the inconveniences encountered as a result. On the other hand, returning the check to the electric company was not likely the proximate cause of lost income resulting from Customer's failure of a real estate exam because Customer was unable to study without electrical lights. Query—whether the bank could be held responsible for lost benefits due to a lapsed insurance policy?

59. See W&S, *supra* note 52, at 661.

60. In *Smith v. Maddox-Rucker Banking Co.*, 68 S.E. 1092 (Ga. Ct. App. 1910), the bank was held responsible for wrongful dishonor under those circumstances. This was a pre-code case; however, W&S are of the opinion that nothing in the code changes the outcome. See W&S, *supra* note 52, at 660.

61. U.C.C. § 4-403(3) provides: "The burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a binding stop payment order is on the customer."

In *Siegel v. New England Merchants Nat'l Bank*, 437 N.E.2d 218 (Mass. 1982), the court analogized the loss from premature payment of a PDC with payment over a stop-payment order and assigned the burden of proving loss accordingly. The burden of establishing the fact and amount of the loss is on the customer.

C. Reimbursement of Customer's Account

Even if the customer has suffered no loss, such as described above, the customer has the right to demand that the bank reimburse the customer's account for the amount of the PDC prior to the stated date on the check. For example, if a check for \$20,000 is dated November 1, 1990, and the bank pays the check prematurely on May 1, 1990, the customer has a right to demand that her account be reimbursed for the \$20,000 immediately, since the check was not properly payable.⁶² Under such circumstances, the bank is obliged to reimburse the customer's account. If the bank has already made final payment⁶³ on the check and has thereby become accountable for it, the bank would be responsible for the \$20,000 until November 1, 1990. On the stated date of the check the bank has a right to reimburse itself out of the customer's account for the amount of the PDC.⁶⁴

D. Certification of Postdated Checks

There is very little reason for the payee of a check to seek certification⁶⁵ since checks, with the exception of PDCs, are immediately payable on demand. On the other hand, nothing prevents the holder of a check from requesting certification. The bank has no obligation to certify a check,⁶⁶ and refusal to certify does not constitute dishonor;⁶⁷

62. See generally *Seigle v. New England Merchants Nat'l Bank*, 437 N.E.2d 218 (Mass. 1982).

63. "Final Payment" is defined in U.C.C. § 4-213.

64. *Roland v. Republic Nat'l Bank*, 463 S.W.2d 747, 749 (Tex. Civ. App. 1971) (when no complaint or stop-payment was made prior to the stated date of a PDC, paid prior to the stated date on the PDC, the bank had a right to reimburse itself from the customer's account).

If the bank is required to reimburse the customer's account for a PDC for the period of time between premature payment and the stated date of the PDC, the bank bears the risk that the customer will deplete or close the account during the interim and that funds will not be available in the account on the stated date of the PDC. If the customer does not have sufficient funds on deposit to cover the instrument on the stated date the bank would have the right to receive a refund from the customer, based upon the deposit contract or the subrogation rights in U.C.C. § 4-407.

65. U.C.C. § 3-411(1) provides: "Certification of a check is acceptance." Acceptance is defined in U.C.C. § 3-410(1): "Acceptance is the drawee's signed engagement to honor the draft as presented."

66. U.C.C. § 3-411(2). However, if a bank refuses to certify a check that the bank would have refused to pay, there has been a dishonor. *Gallinaro v. Fitzpatrick*, 267 N.E.2d 649 (Mass. 1971).

67. A postdated check cannot be dishonored before its stated date. *Wilson v. McEachern*, 71 S.E. 946 (Ga. Ct. App. 1911); *National Park Bank v. Saitta*, 111 N.Y.S. 927 (1908). See also *Sabin Meyer Regional Sales Corp. v. Citizens Bank*, 502 F. Supp. 557 (N.D. Ga. 1980) (bank's

however, if the bank chooses to certify a check, the drawer and all prior indorsers are discharged.⁶⁸

Holders of PDCs have more incentive to seek certification than holders of checks which are immediately payable. Since certification is an acceptance by the bank,⁶⁹ certification operates as the bank's signed engagement to honor the check as presented.⁷⁰ The acceptance of a particularly reliable institution like a bank could enhance the value of a PDC and the ability of the holder to negotiate it further.

For example, suppose on May 1, Paul Payee is holder of a \$10,000 check, drawn by Chris Customer, payable on November 1. Paul could decide to hold the check until November 1 and then deposit it in his account or present it on that date for payment over the counter at Chris' bank. Paul could also negotiate the check to someone else, like Ivy Indorsee, who, in exchange for Paul's indorsement on the check and delivery of the check to Ivy,⁷¹ might be willing to give Paul money for the check. It is likely that Ivy will want to discount the check by at least the amount of interest that she could earn on \$10,000 for the period of time prior to the stated date. Unless Chris is known and trusted by Ivy, she might also desire to discount the check for an amount that represents the risk that Chris will not have funds on deposit to cover the check when the check is presented. If Paul is able to get the check certified by Chris' bank, instead of relying upon the credit worthiness of Chris, Ivy could depend upon the bank for its guaranteed payment, which is less risky than relying upon Chris for payment. The amount of the discount should be reduced accordingly; the risk that the bank will not pay an item after it has been accepted may have a value of \$0, since absent a bank failure the bank is required to pay. Thus, by getting the PDC certified, Peter has enhanced the probability of payment, reduced the risk of nonpayment to Ivy, and thereby increased the present value of the PDC.

The bank has every incentive not to certify PDCs. When the bank

representations to payee that the customer's account has sufficient funds to cover five postdated checks for \$20,000 each does not constitute an acceptance, because acceptance must be written; however, bank may be liable to payee for bank's negligence in reporting the status of the customer's account).

68. U.C.C. § 3-411(1), *supra* note 65.

69. *Id.*

70. U.C.C. § 3-410(1), *supra* note 65.

71. U.C.C. § 3-202(1) defines negotiation: "Negotiation is the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery."

certifies a PDC upon the request of the holder, the bank cannot immediately debit the account of the drawer for the amount of the check, in the same manner as one would expect upon the certification of an ordinary check.⁷² The customer's account should not be debited until the stated date on the check because that is when the check becomes properly payable.⁷³ In the example above, if the bank certified the check on Paul's request on May 1, the bank would be obligated to pay the instrument on November 1, without regard to the status of Chris' account on that date.⁷⁴ Chris would be discharged from liability as a result of the certification.⁷⁵ In essence, the bank rather than Ivy or Paul would assume the risk that Chris would have sufficient funds in the account to cover the check on November 1. Absent some agreement or special relationship with the customer, there is no reason for the bank to assume such exposure to loss.⁷⁶

E. Contract Provisions Limiting the Bank's Liability

Since PDCs expose banks to liability for premature payment, and the current technology for processing checks is not designed to spot PDCs, it is not surprising that some banks have included provisions in their deposit contracts which 1) limit the customer's right to issue PDCs or 2) limit the bank's liability for the premature payment of PDCs. First, the validity of such provisions must be evaluated in light of U.C.C. § 4-103(1)⁷⁷ which allows the provision of Article 4 to be

72. Steffen and Starr, *A Blueprint for the Certified Check*, 13 N.C.L. REV. 450, 467 (1935).

73. See *supra* notes 40-61.

74. See CLARK, *supra* note 10, at 2-15; U.C.C. §§ 3-410 and 3-411, *supra* note 65.

75. U.C.C. § 3-411(1), *supra* note 65.

76. The bank has a limited rule to cancel certification. See generally Annotation, *Right Of Bank To Cancel Certification*, 25 A.L.R.3d. 1367, 1369.

As a general rule, a bank may cancel or rescind its certification of a check or note, provided that no rights of persons other than the holder have intervened, and that the situation or rights of the holder have not been so changed between the time of the certification and its cancellation as to render it inequitable to permit a revocation. This rule has been applied regardless of the nature of the mistake, and hence has been applied both to mistakes as to the amount of the funds of the drawer or maker, and to mistakes in overlooking stop-payment orders.

Id.

Under this rule, the bank should have no right to cancel when there were sufficient funds in the account at the time of certification, but not at the time of presentation since there was no mistake. As a practical matter, however, banks do not certify checks without "holding" funds in the account, absent a special arrangement with the depositor.

77. U.C.C. § 4-103(1) provides:

varied by contract, but prohibits a bank from disclaiming responsibility for its own lack of good faith or failure to exercise ordinary care. Secondly, if such agreements are within the limitations prescribed in U.C.C. § 4-103, what form must they take in order to establish a binding contract between the customer and the bank?

Clark⁷⁸ classified PDCs as conditional instruments,⁷⁹ which I think stretches the concept of conditionality beyond its reasonable parameters. If a future date for payment constitutes a "condition" for a PDC, it should likewise be a "condition" when included in a promissory note. Clark's creative classification does not detract from his analysis of the issue of the bank's disclaimer of responsibility:

On the one hand, payment of a conditional check contrary to the condition would seem to constitute negligence which cannot be disclaimed by the drawee bank. On the other hand, the bank has gone one step further, by prohibiting the customer from drawing such checks altogether, so that the provision is not just a simple disclaimer of negligence.

...

But is the right to draw conditional or postdated checks so fundamental to the deposit contract that it cannot be contracted away? It seems likely that some courts construing § 4-103(1) may in the future consider such clauses as invalid back-door methods of disclaiming negligence contrary to the policy of article 4.⁸⁰

Clark's supposition, that provisions limiting the bank's liability for "payment of a conditional check contrary to the condition would seem to constitute negligence which cannot be disclaimed by the drawee bank" because of U.C.C. § 4-103(1), found some support in the courts prior to the section's adoption. In *Montano v. Springfield Gardens National Bank*,⁸¹ the court contended with the issue of whether a statement, limiting the bank's liability for early payment of PDCs, included

The effect of the provisions of this Article may be varied by agreement except that no agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care or can limit the measure of damages for such lack or failure; but the parties may by agreement determine the standards by which such responsibility is to be measured if such standards are not manifestly unreasonable.

78. See CLARK, *supra* note 10.

79. Although Clark states that PDCs are conditional, Clark acknowledges that PDCs are negotiable under U.C.C. § 3-114.

80. BARKLEY CLARK, *THE LAW OF BANK DEPOSITS COLLECTIONS AND CREDIT CARDS* 2-16 (2d ed. 1981).

81. 140 N.Y.S.2d 63 (1955).

at the bottom of a quarterly statement of account was binding. The court concluded that even if the provision had been binding,⁸² it was difficult to conceive that such a payment was not made without carelessness on the part of an officer or employee of the bank and held that the bank was liable for the premature payment.⁸³ However, the court in *Kalish v. Manufacturers Trust Co.*,⁸⁴ upheld a contract provision which explicitly relieved the bank of liability for payment of postdated items through error, inadvertence, negligence, or carelessness.⁸⁵ Whether *Kalish* would be decided the same under the U.C.C. depends upon whether the bank's failure to detect a PDC and refuse payment prior to the stated date constitutes negligence.

Bankers have a plausible argument that payment of a PDC prior to the stated date does not constitute negligence. After all, the current technology employed by bankers does not identify PDCs once they have entered the stream of processing. Premature payment of PDCs is a common problem in the industry because of bankers' inability to detect them. The reason that PDCs presented prior to their stated dates are paid early is because bankers do not examine the date on checks when they are presented for payment. In many cases the physical item is not present when presentment is made.⁸⁶ Personnel trained to intake checks look for the amount, which is then encoded on the check in mechanically readable form, and a signature. The date is not encoded on the check.⁸⁷ As a result, from the bankers' perspective, PDCs are often paid prior to their stated date despite the bank's use of ordinary care and lack of negligence, and therefore contract provisions limiting the bank's liability for the premature payment of PDCs do not consti-

82. The court concluded that the limitation on liability for prepayment of the PDC was not binding because the customer did not have notice of the provision at the time the depository contract was signed.

83. *Montano v. Springfield Gardens Nat'l Bank*, 140 N.Y.S.2d 63 (N.Y. App. Div. 1955).

84. 191 N.Y.S.2d 61 (1959).

85. *Id.* at 62. In support of its decision the *Kalish* court cited *Gaita v. Windsor Bank*, 167 N.E. 203, 204 (1929) which held: "The common-law liability of a bank in regard to a specific transaction may be limited provided the limitation has the assent of the depositor. In such a situation the clearly expressed intention of the parties will prevail and the rule of 'freedom of contract' will be enforced."

86. In many truncation schemes the physical item is retained by the depository bank or lock box operation. See *infra* note 174 for description of lock box operations.

87. It is also worthy of noting that an individual banker could not incorporate a system which includes the encoding of dates on checks. Any change in technological processes would have to take place industrywide since uniformity is essential to the clearing house system currently employed nationwide to process checks.

The encoding is done with a process called Magnetic Ink Character Recognition (MICR).

tute a disclaimer of negligence in violation of U.C.C. § 4-103, and should be enforceable.

The problem with the bankers' argument is that they excuse their failure to detect PDCs by asserting the limitations of "current technology." There is a difference, I think, between "current technology employed" and "current technology available." My discussions with bankers and computer technicians have revealed that it is feasible for bankers to encode the dates of checks on the checks and program, and adapt the machines that process checks to read the dates, if the banking industry chose to employ such technology. For bankers it is not a matter of what current technology "cannot" do; rather it is a matter of what it "does not" do. Since the technology is available, and since bankers are aware that prematurely presented PDCs are not detected by the existing technology, the bankers may be negligent for failing to employ the available technology.⁸⁸

The success or failure of the bankers' argument depends upon whether ordinary care as used in U.C.C. § 4-103 is broadly or narrowly construed, with the more narrow construction favoring nonnegligence of bankers and enforcement of contract provisions limiting liability. Banks could, as an alternative to limiting their liability for premature payment of PDCs, include a provision in their deposit contracts which prohibits their customers from issuing PDCs. Clark describes contract provisions that prohibit the writing of PDCs as "invalid back-door methods of disclaiming negligence." If courts decide that contract provisions which limit the bank's liability for premature payment of PDCs are unenforceable because the provisions violate U.C.C. § 4-103, it should follow that contract provisions which prohibit the customer from writing PDCs should likewise be held invalid for the same reason. Therefore, the validity of both contract provisions will depend upon whether bankers are negligent for failing to identify PDCs and postponing payment until the stated date.

When banks rely upon contract provisions to avoid liability for premature payment of PDCs, the customer must agree to the provi-

88. The issue of available versus employed technology was contemplated by the court in *Parr v. Security Nat'l Bank*, 680 P.2d 648 (Okla. Ct. App. 1984). In *Parr*, the bank paid a check even though it had received a stop-payment order from its customer. The customer had misstated the amount of the check by 50 cents in the stop-payment order. The bank's technology only identified checks for stop-payment by the exact amount of the check. The court held that the customer had identified the check with reasonable accuracy and that the bank should bear losses incurred by the limitations in its technology. See also *FJS Electronics v. Fidelity Bank*, 431 A.2d 326 (Pa. 1981).

sions.⁸⁹ An agreement can be found in the contract language or by implication from other circumstances including usage of trade, course of dealing, or course of performance.⁹⁰ Does a customer have such full recognition of a provision included in the fine print on the signature card,⁹¹ at the foot of a statement of account mailed quarterly,⁹² in the bank regulations,⁹³ or in several documents (signature card, bank account agreement, and depositor's contract)?⁹⁴

The outcome of the cases is varied enough to suggest that banks should give their customers notice at the time that the contract is signed⁹⁵ of the terms and provisions of the "agreement" between the customer and the bank, especially when those agreements vary the rights that the customer would have under the law.

F. Consideration for Contract Purposes

In *Esecson v. Bushnell*⁹⁶ the purchaser in a condominium sales contract argued that the PDC given as earnest money, on which the purchaser stopped payment prior to its stated date, rendered the contract void for lack of consideration.⁹⁷ The appellate court disagreed with the purchaser and the trial court and stated that a check is a legally enforceable obligation of the maker,⁹⁸ upon which the maker remains bound despite the stop-payment order.⁹⁹ The court held that a

89. Comment 2 to § 4-103(1) describes agreement:

As used here 'agreement' has the meaning given it by § 1-201(3). The agreement may be direct, as between the owner and the depository bank; or indirect, as where the owner authorizes a particular type of procedure and any bank in the collection chain acts pursuant to such procedure Legends on deposit tickets, collection letters and acknowledgement of items, coupled with action by the affected party constituting acceptance . . . are agreements

90. U.C.C. § 1-201(3), definition of agreement.

91. See *David v. Manufacturers Hanover Trust Co.*, 298 N.Y.S.2d 847 (Sup. Ct. 1960) (fine print clause in a signature card waiving the customer's right to a jury trial was effective as an agreement under § 4-103(1)).

92. *Montano v. Springfield Gardens Nat'l Bank*, 140 N.Y.S.2d 63 (N.Y. App. Div. 1955).

93. *Reidman v. Long Island Trust Co.*, 370 N.Y.S.2d 317 (N.Y. App. Div. 1975) (bank failed to prove by any competent evidence that the plaintiff had assented to bank's regulation limiting its liability).

94. *Kalish v. Manufacturers Trust Co.*, 191 N.Y.S.2d 61, 62 (1959).

95. See generally *Montano*, 140 N.Y.S.2d 63.

96. 663 P.2d 258 (Colo. App. 1983).

97. *Id.* The seller in *Esecson* was attempting to enforce a liquidated damages clause which forfeited the earnest money to the seller in the event the purchaser did not tender performance.

98. *Id.* at 890.

99. *Id.* The court noted that the stop-payment order forbids payment by the bank to the payee or indorser, but the maker is still liable.

PDC constitutes valid consideration for a contract.¹⁰⁰

The argument that PDCs do not constitute consideration fails for the same reason as the argument that PDCs are conditional.¹⁰¹ Other types of negotiable instruments are frequently made payable in the future, which does not affect their value as consideration necessary to establish a contract. On the issue of contract consideration, there is no reason to treat PDCs any differently than other negotiable instruments with similar characteristics.

G. Effect Upon Holder in Due Course Status

Holder in due course is a status coveted by plaintiffs in actions on negotiable instruments. Since holders in due course take instruments free from all claims and most defenses,¹⁰² plaintiffs who are holders in due course significantly enhance their chances of winning lawsuits. In order to qualify as a holder in due course the holder must take the instrument for value, in good faith, without notice that it is overdue or has been dishonored, and without notice of any defense against or claim to the instrument on the part of any person.¹⁰³ U.C.C. § 3-304(4)(a) specifically provides that notice that the instrument is ante-dated or postdated does not give the holder notice of a defense or claim; thus, standing alone, the taking of a PDC does not destroy holder in due course status.¹⁰⁴ However, suppose a holder took a PDC with the

100. *Id.*

101. *See supra* note 80.

102. U.C.C. § 3-305 provides:

To the extent that a holder is a holder in due course he takes the instrument free from

(1) all claims to it on the part of any person; and

(2) all defenses of any party to the instrument with whom the holder has not dealt except

(a) infancy, to the extent that it is a defense to a simple contract; and

(b) such other incapacity, duress, or illegality of the transaction as renders the obligation of the party a nullity; and

(c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and

(d) discharge in insolvency proceedings; and

(e) any other discharge of which the holder has notice when he takes the instrument.

The defenses in paragraphs (2)(a)-(e) have been characterized as "real" defenses as contrasted with "personal" defenses. Holders in due course take negotiable instruments free from all personal defenses.

103. U.C.C. § 3-302(1), *supra* note 54.

104. The official comment to U.C.C. § 3-304 states in paragraph 8, "Paragraph (a) of sub-

intention of presenting it prior to the stated date.¹⁰⁶ Certainly such a holder did not take the instrument in good faith, and therefore would not qualify as a holder in due course. But what about the holder who took the PDC with the good faith intention of presenting it on or after the stated date, but decided in the interim to present it early? Would such a holder qualify as a holder in due course?¹⁰⁶ Holder in due course status is established at the time the holder "takes" the instrument. Can a holder in due course lose that status by thereafter acting in bad faith? The answer to that question is a resolute no; there is no precedence for destroying holder in due course status after it is acquired.¹⁰⁷

The holder in due course who makes a premature presentment may nonetheless be exposed to the claims and defenses of those parties with whom he has dealt, because U.C.C. § 3-305(2) only frees the holder in due course from the defenses of parties with whom the holder has not "dealt." If the holder has "dealt" unfairly with the drawer, then the holder should be exposed to the defenses of the drawer as a

section (4) rejects decisions holding that an instrument known to be antedated or postdated is not regular. Such knowledge does not prevent a holder from taking in due course."

105. Subjective intentions are difficult to prove and do not make the best foundation upon which to build a lawsuit. The intention of the party may be inferred from the circumstances, such as when a check postdated by three months is presented for payment on the day or week after receipt. Unless rebutted by evidence demonstrating mistake or inadvertence, the proximity of the presentation for payment to the issuance coupled with a long period of time between presentment and the stated date could provide adequate evidence of the holder's subjective intentions at the time the instrument was taken.

106. Courts have recognized holder in due course status for holders who present PDCs prior to their stated dates. See *Roland v. Republic Nat'l Bank of Dallas*, 463 S.W.2d 747 (Tex. 1971) (the court held that the drawee bank was a holder in due course of checks dated April 14 that were paid by the drawee on April 10. "When the bank paid Jastrow the face value of the checks on April 10, it became a holder in due course of the checks . . ."). The holding is clearly wrong since the drawee bank does not "take" the instrument pursuant to a negotiation and is thus not a holder; one must be a holder to become a holder in due course. See generally U.C.C. §§ 3-302, 3-202, and 1-201(20).

107. The application of the shelter rule found in U.C.C. § 3-201 provides an excellent example of stamina of holder in due course status. That rule states: "Transfer of an instrument vests in the transferee such rights as the transferor has therein, except that a transferee who has himself been a party to any fraud or illegality affecting the instrument or who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course." Example (d) in comment number 3 to that section presents a hypothetical in which a holder in due course gains knowledge of fraud after acquiring the instrument and then transfers it to a third party who qualifies as a holder in due course. Upon repurchasing the instrument from the third party, the holder in due course does not acquire the holder in due course rights of the third party because his position is not "improved" thereby; there is no room for improvement since the original holder already had holder in due course status.

result.

The holder who presents the PDC for payment prematurely will either deposit the check in the holder's bank or present the check to the payor bank for payment. If the check is deposited and the depository bank overlooks the date on the check, it will probably be sent through the collection chain and probably paid by the drawee. Although the payor bank cannot be a holder in due course because it is not a holder, the depository bank may be eligible for holder in due course status. The depository bank's holder in due course status may be challenged if it has notice of a claim or defense or lacks good faith.

Good faith is measured subjectively in the U.C.C., and I feel safe in asserting that banks satisfy the standard in most of their transactions. Banks do not deliberately pay or present PDCs prior to their stated dates. Rather, banks fail to notice the dates; thus qualifying as empty-headed and good-hearted. If depository banks fail to obtain holder in due course status it more likely will be because they have notice of a claim or defense against the instrument.

A depository bank that pays a PDC prior to its stated date has constructive notice of the date on the instrument even if the bank does not take actual notice since the date is on the face of the instrument. But notice of postdating is not enough to destroy holder in due course status.¹⁰⁸ The depository bank must also have notice that there is a claim or defense against the instrument. U.C.C. § 1-201(25) provides that a person has notice of a fact when from all the facts and circumstances known to him at the time in question he has reason to know it exists. Since the depository bank has constructive notice of the postdating, it has reason to know of the drawer's claim against the payor bank for improper payment when the item is presented to the payor bank and paid which should preclude the depository bank from establishing holder in due course status.¹⁰⁹

108. U.C.C. § 3-304(4)(a).

109. Depository banks are responsible for items in several instances under the U.C.C. despite a showing of lack of actual knowledge. For example, in U.C.C. §§ 3-206(4) and 3-419 the first taker, which is frequently the depository bank, of an item that has been restrictively indorsed must pay or apply any value consistently with the indorsement. The rule is objective and the depository bank's failure to take actual notice of the restrictive indorsement is no defense. Likewise, depository banks are responsible for paying items over a forged indorsement under U.C.C. §§ 3-419(1)(c) and 3-417(2). Almost all courts have held that the depository bank is liable for paying an instrument over a forged indorsement even though the literal language of U.C.C. § 3-419(3) provides depository banks with an exclusion from liability. Liability without negligence is not uncommon in the U.C.C.

Payor banks are also liable without actual knowledge. For example, U.C.C. § 4-207(1)(b)

H. The Criminal Law Problem

The courts in criminal cases have had to contend with the issue of whether the drawer of a PDC has committed a crime when the PDC is returned unpaid. Most states have a Worthless Checks Act which provides that anyone who willfully with intent to defraud makes, utters, draws, or delivers to another a check or draft drawn on a bank¹¹⁰ without sufficient funds to cover the check or draft is guilty of a crime.¹¹¹ Placing PDCs into the context of such statutes presents two problems. The first problem deals with the mens rea. Do drawers of PDCs have intent to defraud at the time the check is written? The second problem is definitional. Is a PDC a check within the meaning of the statute?

1. *Defining PDC for Criminal Law Purposes*

In *New York v. Gerber*,¹¹² the court felt it was necessary to determine if a PDC was a check, within the meaning of New York's worthless check statute¹¹³ which stated that "check" does not include any sight order for the payment of money which is "postdated with respect to the time of utterance."¹¹⁴ In *Gerber*, the defendant's attorney was given three postdated checks, which were delivered on their respective dates to the payee. The checks were not honored when they were presented to the payor bank for payment. The case raised a novel question of whether checks which were postdated at the time they were written, but not delivered until their dates were current, were in fact postdated checks. The court looked to the U.C.C. for assistance in defining PDC and found none.¹¹⁵ The court turned to case law and determined that there could be no postdating for criminal law purposes

places liability on the payor bank for a forged drawer's signature. Ostensibly such liability, commonly referred to as the rule of *Price v. Neal*, is based upon the payor bank's failure to compare the drawer's signature with the signature card. See Florence P. Berkley, Note, *Computerized Check Processing and a Bank's Duty to Use Ordinary Care*, 65 TEX. L. REV. 1173 (1987).

110. This is an obvious redundancy since drafts drawn on banks are by definition checks. Coincidentally, a PDC is a draft drawn on a bank that does not fall within the definition of a check; so the drafter's redundancy may have included PDC, which technically would not have been included if the legislation only said checks.

111. See, e.g., ALA. CODE § 13A-9-13.1 (1989); OHIO REV. CODE ANN. § 2913.11 (Baldwin 1988).

112. 453 N.Y.S.2d 998 (1982).

113. N.Y. PENAL LAW § 190.05 (McKinney 1988).

114. N.Y. PENAL LAW § 190.00(1) (McKinney 1988). State penal codes frequently contain a definition that excludes postdated checks.

115. 453 N.Y.S.2d 998, 1000.

without notice of the same.¹¹⁶ Since the payees in the case had notice of the postdating, the court treated the PDCs as checks and found the defendant guilty under the statute.¹¹⁷

The opinion of the court is correct to the extent that it used the definitions in the statute and case law to include the checks within the definition of check for purposes of the statute. However, it is inappropriate to conclude that the defendant willfully issued the checks with intent to defraud the payees without a further inquiry into the defendant's state of mind at the time. The United States criminal justice system is founded on principles which penalize individuals who act with the prescribed level of criminal intent or *mens rea*. A conviction which is not based upon whether the payee had notice of the postdating runs contrary to those principles. It is conceivable that lack of notice and lack of criminal intent could peacefully coexist under the circumstances presented in *Gerber*.¹¹⁸

2. Criminal Intent

In order to be found guilty under a worthless check statute, the defendant must have written the checks with an intent to defraud the payee. The payee is defrauded because the payee thinks that there is money in the account to cover the check (and usually gives the defendant something of value based upon that belief) when in fact there is none. The payee of a PDC knows when the check is accepted that there are currently insufficient funds in the account to cover the check and that there might still be insufficient funds in the account on the future date which appears on the check.¹¹⁹ That knowledge precludes the payee from being defrauded. The postdating of the check is sufficient to give the payee notice that there are no funds and there may never be

116. *Id.* at 1001. The court looked to the time of utterance to determine if a check is postdated. The statute defined utterance as the time the check is delivered to the person who acquires a right against the drawer with respect to such a check. N.Y. PENAL LAW § 190.00(4) (McKinney 1988).

117. 453 N.Y.S.2d at 1003.

118. The defendant for example, could have written the checks and given them to his attorney anticipating having the money in the bank at the time the checks came due and as a result of circumstances, unforeseen at the time he wrote the checks, did not have the money. The defendant would thereby lack the criminal intent while the payees lacked notice of the postdating.

119. *Gerber*, 453 N.Y.S.2d at 1002. *Anderson v. Bryson*, 115 So. 505 (Fla. 1925); *People v. Kubitz*, 235 N.Y.S.2d 971 (1963); *People v. Kapitovsky*, 258 N.Y.S. 861 (1932); *Ohio v. Creachbaum*, 263 N.E.2d 675 (Ohio 1970). Cases with similar holdings on this point are numerous.

any.¹²⁰ The result is that the person who takes a PDC takes at his own risk and the criminal law will provide no more protection than it does for any other bad debt. One court very aptly said:

One who knowingly takes a postdated check . . . and exchanges an article of value therefor, makes the exchange not upon his faith that the drawer has at the time sufficient funds to meet the check, but upon his willingness to risk the ability of the drawer to make a deposit and to have in bank, on or after the date mentioned in the check, sufficient funds with which to comply with the obligation.¹²¹

III. THE REVISED U.C.C. ARTICLES 3 AND 4 AND POSTDATED CHECKS

A. Definition of Postdated Check in the Revised U.C.C. Articles 3 and 4

The revised U.C.C. Articles 3 and 4¹²² have specific provisions for PDCs; however, there is no definition for PDC and the reader is required to dovetail several sections in order to determine that a PDC is included in the definition of "check." Revised U.C.C. § 3-104(f) defines check as follows:

"Check" means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank or (ii) a cashier's check or teller's check. An instrument may be a check even though it is described on its face by another term such as money order.

This definition, standing alone, suggests that the drafters of the revised Articles 3 and 4 have again decided to leave a longstanding ambiguity in the law: checks are payable on demand, but PDCs are payable after their stated date, therefore PDCs are not checks. Although PDCs have not been classified as instruments "payable on demand" as that term has been defined in the past, a new definition of payable on demand could include PDCs, which are payable on demand after the date of the instrument. That appears to be the intent of the drafters. Revised

120. "Likewise, a postdated check, in the absence of a present representation that the check is good, carries on its face implied notice that the maker does not presently have sufficient funds on deposit to pay the check." *People v. Meller*, 524 P.2d 1366, 1367 (Colo. 1974). See also *Matter of Griffin*, 83 Cal. App. 779 (1927); *Highsmith v. State*, 38 Ga. App. 192 (1928); *Turner v. Brenner*, 138 Va. 232 (1924); *State v. Carr*, 294 P. 1016 (Wash. 1930).

121. *Neidlinger v. State*, 88 S.E. 687, 688 (Ga. Ct. App. 1916).

122. See Final Draft, *supra* note 37.

U.C.C. § 3-108(a) defines "payable on demand" as:

A promise or order is "payable on demand" if (i) it states that it is payable on demand or at sight, or otherwise indicates that it is payable at the will of the holder, or (ii) it does not state any time of payment.

Typically checks or PDCs do not state that they are payable on demand; however, it is rational to argue that checks are implicitly payable at the will of the holder.¹²³ In other words, since checks, by their very nature, are payable at the will of the holder, when the drawer decides to issue a check that characteristic is accepted. Postdating the check does not refute that implication since PDCs are payable at the will of the holder just like an ordinary check. The holder of a PDC must present the check for payment, and therefore, it is irrefutably payable at the will of the holder. The only qualification is that the holder's "will" should not be exercised until after the stated date.

That this was the intent of the drafters is confirmed by revised U.C.C. § 3-113(a) which states:

An instrument may be antedated or postdated. The date stated determines the time for payment if the instrument is payable at a fixed period after date. Except as provided in § 4-401(3), an instrument payable on demand is not payable before the date of the instrument.

The last sentence specifically provides for a postdated instrument payable on demand.¹²⁴ The drafters anticipated that an instrument could be both postdated and payable on demand as the latter term is defined in revised U.C.C. § 3-108(a).

123. Checks are payable at the will of the holder because checks must be presented in order to receive payment. Without presentment there is no right to obtain payment from the drawee or from secondary parties unless presentment is excused. U.C.C. § 3-501(1)(c) requires presentment for payment in order to charge any drawer or indorser. Since a holder has the power to decide whether or not to present the item for payment it is clear that checks are payable at the will of the holder. The provisions in U.C.C. § 3-501(1)(c) are found by dovetailing revised U.C.C. § 3-501(a), which defines presentment, revised U.C.C. § 3-502(b)(1), which defines dishonor of a check, and revised U.C.C. § 3-414(a), which imposes liability on the drawer in the event of dishonor.

124. The drafters provide that postdated instruments are not payable before the date of the instrument. The exception in new § 4-401 requires bank customers to give notice to the bank of the postdating of a check. Failure to do so relieves the bank of any responsibility for paying a check prior to the date of the instrument. *See infra* notes 132-36 and accompanying text. Current U.C.C. § 3-114(2), *supra* note 23, like new § 3-113, also makes provisions for an instrument that is payable on demand and postdated. This language created an ambiguity because there is nothing in the current U.C.C. which makes it clear that PDCs are payable on demand.

Undoubtedly, these new provisions take PDCs out of the definitional limboland they have resided in for the past few centuries. The argument that the definition of PDC has been ambiguous long enough to deserve specific reference in the new Articles 3 and 4 has merit: a simple statement included in the definition of checks, much the same as the specific reference to money orders, cashier's checks, and teller's checks would be appropriate.¹²⁵ Others, including the writer, will be content that the revised code, particularly § 3-113(a), clears up a long-standing area of ambiguity in a straightforward manner that does not take a rocket scientist to figure out.¹²⁶ Whatever the drafters' reasons were for not embellishing PDCs with space in the definition section, that omission may parallel the disposition of bankers and commercial lawyers about PDCs. PDCs create big problems for bankers, whose electronic processing systems do not spot postdated checks. Rather than dignify PDCs with a definition, many bankers would probably prefer to eliminate PDCs and have all checks mature on date of issue.¹²⁷

B. The Revised U.C.C. Article 4 and the Section 4-401 Notice Provision

The current U.C.C. Article 4 was written with a primary focus on the interests of bankers,¹²⁸ which created some controversy at the time that it was adopted.¹²⁹ The revised U.C.C. Article 4 maintains the

125. The classification of the three named items have suffered a much shorter history of problems than PDCs.

126. The revised U.C.C. Articles 3 and 4 make specific reference to PDCs in the comment to U.C.C. § 3-113 which mentions PDCs while explaining that section's relationship to § 4-401(c). Revised U.C.C. § 4-401 refers to PDCs in its text.

127. That is what the court decided in the *MaGill* case, despite longstanding widely accepted legal principles to the contrary. *MaGill*, 6 Q.L.J. 262 (Austl. 1895). Although there is little legal precedence for making all checks payable from date of issue, given the current state of technology, practical reasons for doing so abound. See *infra* notes 128-36 and accompanying text.

Many lawyers regard PDCs as a poor substitute for other instruments that are more suitable to achieve a desired result. PDCs are often used instead of promissory notes, bills of exchange, or as credit devices. Frequently, the use of PDCs creates problems that may have been avoided if an instrument had been chosen that was more appropriate for the transaction. As much as lawyers and bankers may desire for PDCs to "go away," they are very much a part of modern day commerce and have been employed in some surprisingly creative circumstances. See description of various uses of PDCs, *supra* notes 12-18 and accompanying text.

128. Edward L. Rubin, *Policies and Issues in the Proposed Revision of Articles 3 and 4 of the U.C.C.*, 43 BUS. LAW 621, 626 (1988) ("It is no secret that article 4 was drafted primarily by bank attorneys and views the world through banker's eyes.").

129. See Fred Beutel, *The Proposed Uniform [?] Commercial Code Should Not Be Adopted*, 61 YALE L.J. 334 (1952).

same orientation.¹³⁰ Professor Edward L. Rubin described the basic goals of the U.C.C. revisions:

The first goal is to modernize the U.C.C. rules and make them consistent with current technological developments. The second is to clarify or correct those provisions that have caused interpretive difficulties for the courts.¹³¹

The dichotomy between the U.C.C. rules governing PDCs and the technology used to process checks create a classic example of the kinds of issues that the revisions were intended to address. The problems with postdated checks could have been addressed from several different angles. For example, the drafters could have: 1) left the existing law intact; 2) required that the bankers MICR encode the date on each check and pay them in accordance with the stated date; 3) prohibited the use of PDCs; or 4) required that drawers give their banks notice that the drawers have issued PDCs.

The drafters could not leave the existing law in tact without falling short of their goals. Inconsistency between prevailing technology and the current rules is the source of the problems that bankers and their customers have with PDCs. The check processing technology employed by bankers does not include the MICR encoding of the date of the check, but the current U.C.C. rules presume that bankers are aware of all information on checks, including the dates. Nor could the drafters presume, if existing rules were not changed, that bankers would voluntarily adopt technology that included MICR encoding of the date on checks. Even though bankers could avoid exposure to liability for premature payment of PDCs by encoding the date, bankers have suffered with the exposure to such liability for years and have not responded with changes in technology.

The drafters probably had the same rationale as the bankers for not selecting the second option: it is too expensive. Relatively few PDCs are issued when compared to the total number of checks processed daily. Bankers argue that PDCs represent such a small proportion of the total number of checks that incurring the cost of the new technology necessary to MICR encode the dates on checks is not justified.

130. Rubin, *supra* note 128, at 627. Rubin states, "This basic orientation [of articles 3 and 4] toward banks has become increasingly controversial. . . . The revision embodies essentially the same choice; it preserves the basic distribution of losses between consumers and the banks, avoids creating any new consumer rights, and retains the power of the banks to vary the UCC terms by agreement, including agreements among themselves that are then binding on the customers." *Id.*

131. Rubin, *supra* note 128, at 628.

Furthermore, encoding the date would slow the check processing system down by the time required to place the date on each check. Even though it might only take a few seconds per check, cumulatively the time required to encode the dates on checks would result in a significant slowdown in check processing.

Prohibiting the issuance of PDCs is a drastic change from existing law and would probably be considered too offensive to the interests of customers. Alternative four placed the burden of identifying PDCs on the customer, without depriving the customer of the right to issue PDCs. The new provision found in revised U.C.C. § 4-401 requires that customers give their bankers notice that PDCs have been issued, otherwise the PDCs are properly payable. The revised § 4-401(c) provides:

When Bank May Charge Customer's Account

(C) A bank may charge against the account of a customer a check that is otherwise properly payable from the account, even though payment was made prior to the date of the check, unless the customer has given notice to the bank of the postdating describing the check with reasonable certainty. The notice will be effective for the period stated in § 4-403(b) for stop orders, and must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it before any action by the bank with respect to the check described in § 4-303. If a bank charges against the account of customer a check before the date stated in the notice of postdating, the bank is liable for damages for the loss resulting from its act. The loss may include damages for dishonor of subsequent items pursuant to § 4-402.¹³²

This provision gives drawers of PDCs essentially the same treatment as customers who wish to stop payment on a check. In order for a stop-payment order to be effective, the drawer must notify the payor bank in time for the bank to stop payment.¹³³ Oral notice is good for fourteen days after which the order must be confirmed in writing.¹³⁴ Mechanically, the process employed by the bank to execute a stop-pay-

132. See Final Draft, *supra* note 37.

133. U.C.C. §§ 4-403 and 4-303, *supra* note 44.

134. Revised U.C.C. § 4-303(b) provides:

A stop payment order is effective for six months, but it lapses after 14 calendar days if the original order was oral and was not confirmed in writing within that period. A stop payment order may be renewed for additional six month periods by a writing given to the bank within a period during which the stop payment order is effective.

The revised U.C.C. § 4-401(c) adopts the notice provisions for stop-payment orders in revised U.C.C. § 4-403.

ment order or notice of postdating is similar. The payor bank inputs a description of the check into its electronic payment system, which identifies the check and causes payment to be denied.¹³⁵ For stop-payments timely notification is a prerequisite to the bank's responsibility for the check. Likewise under the new provision, the payor bank is not responsible for untimely payment of PDCs unless the bank has received timely notice. In essence, under the new section, PDCs are properly payable at the time they are presented without regard to the stated date, unless the bank has a notice of postdating. Although this provision is new to the U.C.C., it is not novel. Four states currently have laws which similarly predicate the bank's liability for premature payment of PDCs on the timely receipt of a notice of postdating from the customer.¹³⁶ The state legislatures in Kansas, Florida, Alabama, and Utah have adopted special provisions in their banking law statutes that require written notice.

C. Reasons Why the Drawer Should Be Required to Give Notice

The Federal Reserve System provides payment services for the banking system.¹³⁷ In 1987 the U.S. Congress passed the Expedited Funds Availability Act (EFAA) to decrease the time between deposit of check and availability of funds for use by the depositor.¹³⁸ In order to make funds available to the customer faster, checks must be paid as quickly as possible. The drafters of the revised U.C.C. Articles 3 and 4 observed the mandate of the newly adopted EFAA. One of their objectives was to accommodate an expedited payment system designed to get checks paid fast and eliminate delays and float.¹³⁹ With that in mind,

135. Sometime after the electronic process is completed, the actual paper instrument is delivered to the bank and the check will be stamped to indicate that payment has been stopped and returned to the payee. For a description of the automated forward presentment process currently used by the banking system, see Miller, Ballen, Davenport & Vergari, *Commercial Paper, Bank Deposits and Collections, and Commercial Electronic Fund Transfers*, 42 BUS. LAW. 1269 (1986-87) [hereinafter Miller].

136. See CLARK, *supra* note 10, at 2-17. "If a check is postdated, the bank will be liable for paying it before its appointed time. With this exposure in mind, bankers have obtained special statutes in some states that require written notice of a PDC; in the absence of such notice given by the drawer, the bank cannot be held liable for wrongful payment." *Id.*

137. See Miller, *supra* note 135, at 1270. Federal Reserve Act of 1913, Pub. L. No. 43, Ch. 6, 38 Stat. 251 (1913).

138. Pub. L. No. 100-86, 101 Stat. 552 (to be codified in 12 U.S.C. sections 248a, 4001-4010) (1987).

139. Electronic Processing System read and sorted checks at a rate of up to 120,000 checks per hour in 1984. See Weshler, *Delayed Funds Availability*, 35 SYRACUSE L. REV. 1117, 1129

the drafters of the revised code had to reconsider those provisions of the current U.C.C. which: 1) were insensitive to electronic processing systems, and 2) slowed down the payment of a check. PDCs are guilty on both ends. The current code treatment of PDCs places liability on the payor bank for premature payment, apparently presuming that the payor bank examines the check prior to making the payment decision.¹⁴⁰ The electronic payment system is not designed to consider the date on a check, and modification of the system would slow down the payment of all checks.¹⁴¹

Rather than revise the electronic processing system to accommodate PDCs, the drafters revised the rules relative to PDCs to accommodate the system. Any drawer who desires to employ the system in an extraordinary transaction, like postdating a check or stopping payment on a check, has to notify the bank of that intention. This places the burden of identifying the extraordinary transaction on the drawer and relieves the industry of the necessity of taking time-consuming and costly steps to avoid exposure to liability.¹⁴²

Placing the burden on the drawer has some semblance of propriety. Drawers of PDCs use them to carry out personal objectives that are foreign to the normal function of a check. When a check is used as an extension of credit, debt collection device, will, or otherwise,¹⁴³ it is endowed with special characteristics, reflective of the underlying transaction. The benefit of the special characteristics flow to the drawer and/or the payee. It follows that one or both of those parties should share in the burden.¹⁴⁴ That the revised U.C.C. places the burden upon the drawer rather than the payee may be a matter of practicality; the

(1984). The draft of current U.C.C. was completed 5 years before the American Bankers Association Technical Subcommittee on Mechanization of Check Handling recommended a computerized check handling system. *See generally*, ALDOM, PURDY, SCHNEIDER & WHITTINGHAM, AUTOMATION IN BANKING (1963) [hereinafter ALDOM & PURDY].

140. *See supra* notes 40-61 and accompanying text.

141. Every time an additional item is added to the list of items that a check handler must look for or encode on the MICR line additional time is required, which slows down the collection process.

142. It is obvious at this late date that the industry did not deem it economically efficient to modify the collection system in order to avoid exposure to liability for premature payment of PDCs. The electronic payment system has been in place for 35 years and no steps have been taken to accommodate PDCs.

143. *See supra* notes 12-18 and accompanying text.

144. The burden is truly only a shared burden. The payor bank must still take measures to identify the check and make certain that it is not prematurely paid. The payor bank also assumes liability on the check if it is paid after the bank receives notice of the postdating.

drawer has the relationship with the payor bank.

A further reason for requiring drawers to give notice to the bank is that it is less costly for drawers to give notice than it is for the banking industry to make changes to accommodate PDCs. If the drawer notifies the bank of a PDC, the cost may be no greater than that of a phone call, or the paper envelope, and stamp used to send the written notice, or a trip to the bank, and the time involved in performing either task. If the burden of identifying PDCs were assumed by the banking industry, each check sent through the process would have to be inspected for a date. Bankers would then have to decide what to do with PDCs after they have taken the time to identify them. The check would either have to be sorted out for hand processing or encoded with the date. If the industry chose to encode the date, it is possible that every check would have to have the date encoded and the system designed not to pay those checks which are postdated. It does not make a whole lot of sense to have the industry inspect every single check for the date in order to catch the one check in one hundred thousand¹⁴⁵ or so that is postdated.

Drawers will have to act expeditiously in order to avoid premature payment of PDCs. The new notice requirement may result in a race to the bank between the drawer and the payee. If the payee beats the drawer to the bank and presents the PDC for payment, the drawer loses. Conceivably, a drawer could issue a PDC at 1:00 p.m. on a banking day, notify the bank at 1:30 p.m. and still suffer loss if the check is presented between 1:00 p.m. and 1:30 p.m. Any time gap between issuance and notification to the bank could result in premature payment. In order to insure that premature payment is not made, the drawer will have to give the bank notice prior to or simultaneously with the issuance of the PDC.¹⁴⁶ Thus, the notice rule encourages the drawer to give the bank prompt notice of postdating.

D. Should Written Notice Be Required by the U.C.C.?

All of the provisions on PDCs adopted by states prior to the revisions to Articles 3 and 4 require that the customer give the bank written notice of postdating. In 1975 the banking lobby in Kansas was instrumental in having a notice provision included in U.C.C. § 4-401.¹⁴⁷

145. The figure is hypothetical and is not statistically derived.

146. The written notice requirement may prove less burdensome to drawer's as modern technological innovations like fax machines become more accessible. A written notice could be faxed to a bank in no less time than it would take to make a telephone call and give oral notice.

147. KAN. U.C.C. ANN. § 84-4-401(3) (Vernon 1983) provides:

The notice provision is the only nonuniform provision included in Article 4 of the Kansas U.C.C.,¹⁴⁸ and was adopted in part, according to the legislative commentators, because PDCs are "offbeat" items and bankers deserve written notice, sufficient to identify the check, that the check will be presented.¹⁴⁹ Under the statute the drawer must notify the bank of the date, number, amount of the check, and the name of the payee.

The Florida and Utah statutes require written notice of postdating as a prerequisite to payor liability;¹⁵⁰ however, unlike the Kansas statute, the Florida and Utah notice provisions are found in statutes regulating financial institutions. The Florida statute was initially adopted in 1953, and thus predated that state's adoption of the U.C.C.¹⁵¹ The

No bank shall be liable for charging against its customers account a postdated check, otherwise properly payable from such account, before the date stated thereon unless the customer has given written notice to the bank that the check is postdated. Such notice shall include the name of the payee, the date, the number and the amount of such check.

The official comment to subsection 4-401(3) provides:

Subsection 3 is a non-uniform provision added by the Kansas legislature in 1975 at the behest of the Kansas Banker's Association. It is the only non-uniform provision in Article 4 of the Kansas U.C.C. It is intended to give drawee banks protection against postdated checks. If the drawer wants to make the postdating stick, he must give written notice to the bank that such a check is on the way. Otherwise the check is "properly payable" even though paid before the later date. The theory behind the amendment is that post-dated checks are unusual items, they run contrary to commercial expectations, and it is not unfair to require the customer to give some prior notice to the bank that the offbeat item will be presented.

148. See comment to KAN. U.C.C. ANN. § 84-4-401 (Vernon 1983).

149. *Id.*

150. FLA. STAT. ANN. § 658.64 (formerly § 659.36)(West 1984) provides as follows: Issuance of post-dated checks: It shall be the duty of the person drawing a post-dated check to notify, in writing, the bank upon which such check is drawn, giving a complete description thereof, including the name of the payee, the date, the number and the amount thereof, otherwise the bank or trust company shall not be liable for paying such a check.

The language of previous, repealed versions of the statute used the adverb "erroneously" before "paying."

UTAH CODE ANN. § 7-1-616 (1988) provides as follows:

Authority to accept transaction accounts

(5) It is the duty of the person drawing a post-dated check, draft or other negotiable or transferable instrument, to notify, in writing, the branch of the financial institution upon which the check, draft, or other negotiable or transferable instrument is drawn, giving a complete description of the instrument, otherwise, the financial institution is not liable for erroneously paying the check, draft or other negotiable or transferable instrument before the date it bears.

151. See FLA. STAT. ANN. § 247 (West 1980) (Historical Note). In Florida, the courts have had an opportunity to interpret and apply its statute in *Florida Nat'l Bank v. Dental*, 210 So. 2d

Utah notice provision was not adopted until 1981,¹⁵² long after that state adopted the U.C.C.

The notice provision in Alabama predicates liability of the bank for paying a check prior to its date on the drawer's failure to write "POSTDATED" across the face of the check.¹⁵³ The statutory comments indicate that placing such a legend on the check was common practice in Alabama. "This section . . . is intended to protect bank customers by making postdating of a check effective as understood by the public."¹⁵⁴ The drafters of the revised U.C.C. have taken a strong position against any writings on a check that are out of the ordinary.¹⁵⁵

241 (Fla. 1968). The plaintiff had issued a PDC dated December 13, 1963 for \$10,000 drawn on defendant's bank. The check was paid on December 12. When the bank opened on the morning of December 13, plaintiff gave the bank an oral stop-payment order. The court held that the statute precluded any liability on the part of the bank, although the check was paid prior to the stated date, when the plaintiff failed to give the bank written notice prior to the time that the check was paid. *Id.*

152. See UTAH CODE ANN. § 7-1-616 (1988) (History).

153. ALA. CODE § 5-5A-34 (1980) provides:

Payment of postdated checks. Whenever a postdated check is drawn upon any bank, the bank upon which the check is drawn, shall not be liable to the drawer of said check because of paying the check prior to the date thereof, unless there appears written across the face of the check in bold type or writing the word "POSTDATED."

The provision was included in a major revision and modernization of the Alabama Banking Code in 1980. The notice provision was not new and had been included in the banking code that preceded the 1980 revisions.

154. ALA. CODE, Comment to § 5-5A-34 (1980). This language could also mean that the public expected the bank to pay a PDC on the stated date and the statute continued that practice.

Arguably, such a legend could help to solve some of the problems with PDCs experienced by bankers as a result of the electronic payment system. In the ordinary case, the only person that scrutinizes the check after it enters the forward collection process is the first person who handles it. That person could be a teller or employee at a bank where the check is presented for payment or deposit, or the clerk in the lockbox operation who electronically encodes the check with the amount and the code number of the depository bank on the MICR line. This information is then mechanically read. The decision of whether to pay an item is made electronically, based upon the amount of the check and the balance in the customer's account.

155. See Rubin, *supra* note 128, at 662. In a draft as late as September 1979, a new § 4-110 was included that provided as follows:

Information on a check that may be disregarded except as otherwise provided within this [ACT], a bank in paying, purchasing, or taking a check for collection, may disregard information on the check other than the signature of the drawer, the identification of the drawee and payee, the amount, information encoded on the check in machine readable form pursuant to banking industry standards and indorsements. Except as provided in § 4-404, a payor bank may also disregard the date unless the drawer has given notice of postdating pursuant to § 4-401(3).

Id.

This provision was intended to facilitate check truncation and electronic check processing, however, it was edited out of the Proposed Final Draft and a provision more specifically addressing truncation was included in the draft.

That principle is what gave rise to the notice provision for PDCs. Bankers argue that handwritten, as opposed to electronically encoded, messages or irregularities such as postdatings, on checks are incompatible with the high speed electronic check processing currently employed in the banking system,¹⁵⁶ and that the cost of identifying checks containing handwritten messages is prohibitive.¹⁵⁷

The oral notice provision in the revised U.C.C. is less favorable to bankers in Kansas, Utah, and Florida than their current law.¹⁵⁸ One could predict that the bankers in those states, particularly in Kansas and Utah where the legislation creating the written notice requirement is more recent, will be hesitant to have the written notice requirement replaced with an oral one. A strong lobby to maintain the status quo could lead to nonuniformity in the U.C.C. in those states, and other state legislatures might be encouraged to follow their lead. Standing alone that threat does not provide persuasive support for a written notice requirement. Written notice is burdensome to customers, without offsetting increases in benefit to the banks. Bankers already have the facilities for accepting oral orders of stop-payments on checks and the same procedures can be employed for notices of postdating. Whether oral or written, the notice provision will require that the drawer beat the payee to the bank; otherwise the PDC is properly payable. Written notice just makes it more difficult for the drawer to win the race, since oral notice can usually be effected faster than written notice.

E. Can Banks Contractually Prohibit Customers From Postdating Checks?

Courts have determined that customers can stop payment and that right cannot be taken away by contract.¹⁵⁹ U.C.C. § 4-403(2) states

156. See Rubin, *supra* note 128, at 663.

157. See *ALI-ABA Course of Study Materials*, THE EMERGING NEW UNIFORM COMMERCIAL CODE (Comment to U.C.C. § 4-110, Supplement Sept. 7-9, 1989).

158. The oral notice provision in the revised U.C.C. is more favorable to bankers in Alabama than their current legend provision. Lobbyists for consumers will be more likely to complain than bankers.

159. U.C.C. § 4-103, *supra* note 77, precludes the bank from varying the U.C.C. in such a way that disclaims the bank's responsibility to exercise ordinary care. Case law has supported the position that although banks can vary § 4-403 by agreement, the bank cannot eliminate the customer's right to stop payment. See generally *McLaughlin v. Franklin Soc. Fed. Sav. and Loan Ass'n*, 6 U.C.C. REP. SERV. 1183 (N.Y. Civ. Ct. 1969); *Richardson Heights Bank and Trust v. Wertz*, 482 S.W.2d 692 (Tex. Civ. App. 1972). However, the District of Columbia statute requires that a stop-payment order be in writing specifically describing the item to which it relates by stating the amount, date, and payee thereof; the court allowed the bank to waive that provision

that "An oral order is binding upon the bank only for fourteen calendar days unless confirmed in writing within that period." The comments to the U.C.C. describe stopping payment as a "service which depositors expect and are entitled to receive from the bank notwithstanding its difficulty, inconvenience, and expense."¹⁶⁰ It would not be an overstatement to say that stop payment is a legal "right" which accrues to the benefit of the drawer. There is a general sense that customers should have a right to stop payment on checks and that banks should bear the burden and occasional losses that result from foul ups.¹⁶¹

The practice of postdating a check could be described as a right, similar to the right to stop payment on a check, because the U.C.C. makes specific provisions for PDCs just as it does for stop-payment orders. That is where the similarity ends. PDCs do not share the elevated status of stop-payment orders. Many lawyers think of PDCs as a poor substitute for something better.¹⁶² Undoubtedly bankers, who were heavily involved in the drafting of the revised U.C.C., would not find it desirable to place PDCs on the same "pedestal" as stop-payment orders. However, the revised U.C.C. Articles 3 and 4 provide treatment of PDCs that is analogous to the treatment given stop-payment orders. Since the notice requirements, timeliness of notice, and liability of the bank for failure to follow the customer's instructions in the notice are the same for PDCs and stop-payment orders, the logical mind does not have to be stretched far to reason that the customer's right to issue PDCs should be afforded the same legal protection as the customer's right to stop payment.

The treatment of PDCs in the revised U.C.C. should be evaluated in light of the status given PDCs prior to the revisions. As discussed in Part II of this article,¹⁶³ the enforceability of contract provisions limiting the customer's right to issue PDCs is dependent upon whether the banks are contracting away their obligation to act in good faith and exercise ordinary care.¹⁶⁴ Given the current definition of ordinary care

requiring a writing in the customer contract. *Rimberg v. Union Trust Co. of D.C.*, 12 U.C.C. REP. SERV. 527 (D.C. Super. Ct. 1973).

160. Official Comment 2 to U.C.C. § 4-103.

161. See the official comment 2 to § 4-403 which states: "The position taken by this section is that stopping payment is a service which depositors expect and are entitled to receive from banks notwithstanding its difficulty, inconvenience and expense. The inevitable occasional losses through failure to stop should be borne by the banks as a cost of the business of banking."

162. See *supra* notes 10-18 and accompanying text.

163. See *supra* notes 77-95 and accompanying text.

164. U.C.C. § 4-103.

in U.C.C. § 4-103, a good case can be made for limiting the bank's ability to limit the customer's right to postdate checks by contract. That conclusion is based upon the broad definition of ordinary care and good faith in the current U.C.C. The drafters of the revised U.C.C. Articles 3 and 4 included the following definition of ordinary care in revised U.C.C. § 3-103(7):

"Ordinary care" in the case of a person engaged in business means observance of reasonable commercial standards, prevailing in the area in which that person is located, with respect to the business in which that person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by this Article or Article 4.¹⁶⁵

This narrow definition of ordinary care relieves banks of the duty to examine instruments for a date if other banks in the area in which the bank is located do not. Since the technological processes which do not include examining checks for dates or MICR encoding the date on the check are industry wide, banks can observe reasonable commercial standards and exercise ordinary care even though the banks fail to detect PDCs. This definition of ordinary care would give the banks the go ahead to include provisions in their contracts limiting the customers' rights to postdate checks, without disclaiming any responsibility for the banks' lack of good faith or failure to exercise ordinary care. Given the very narrow definition of ordinary care in revised U.C.C. § 3-103(7),¹⁶⁶ it is likely that contract provisions limiting the customers' right to issue PDCs will not violate revised U.C.C. § 4-103.¹⁶⁷

165. See Final Draft, *supra* note 37. In addition to U.C.C. § 4-103(1), this definition of ordinary care affects the bank's liability under U.C.C. § 3-406, Negligence Contributing to Alteration or Unauthorized Signature, and U.C.C. § 4-406, Customer's Duty to Discover and Report Unauthorized Signature or Alteration.

166. See *supra* note 165 and accompanying text.

167. The revised U.C.C. § 4-103(a) provides:

The effect of the provisions of this Article may be varied by agreement but the parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure. However, the parties may determine by agreement the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable. This section is essentially the same as U.C.C. § 4-103 (1977). All of the changes can best be described as stylistic.

F. Can Banks Require Written Notice?

The best argument that the banks are precluded from requiring written notice of PDCs is that PDCs should be treated like stop-payment orders, and customers have a longstanding legally recognized right in U.C.C. § 4-403(2) to give oral orders for stop-payment which are good for fourteen days.¹⁶⁸ The banks have a very good counterargument that PDCs are not stop-payment orders and there is no reason to afford them the same treatment. The revised U.C.C. provisions for stop-payment orders do not explicitly state that oral stop-payment orders are binding for fourteen calendar days. Revised U.C.C. § 4-403(b) states: "A stop payment order is effective for six months, but lapses after 14 calendar days if the original order was oral and was not confirmed in writing within that period." This language falls far short of the mandate in current U.C.C. § 4-403(2). Without the statutory language mandating that oral stop-payment orders are binding, banks should be able to require written stop-payment orders by contract with their customers. Contract provisions requiring that stop-payment orders be written will have to fall within the limitations established by revised U.C.C. § 4-103 and not disclaim the bank's responsibility to exercise good faith and ordinary care, but I see no reason why that provision should limit the banks' ability to require written notice. If the revised U.C.C. allows banks to require written stop-payment orders, the argument that PDCs should receive the same treatment as stop-payment orders leads to the conclusion that written notice can be required for postdating notices.

There is nothing in the language of revised U.C.C. § 4-401(b) that would limit the banks' ability to also contractually require customers to give written notice of postdating. Contract provisions requiring written postdating notices would not fail because of the good faith and ordinary care limitations in revised U.C.C. § 4-103. As discussed above those limitations are narrow enough to allow the banks to preclude customers from issuing PDCs, so it follows that banks should also be able to require written notice without offense to that provision.

G. Who is Liable for Early Payment of Postdated Checks?

In the revised U.C.C. the payor bank is not liable for premature

168. U.C.C. § 4-403(2) provides: "An oral order is binding upon the bank only for fourteen calendar days unless confirmed in writing within that period."

payment of PDCs in the absence of timely notice from the drawer. Does that mean that the drawer who fails to give timely notice is left holding the bag—all of the losses that could result from the nonperformance of the payee or dishonor of checks resulting from depletion of the account?¹⁶⁹ The revised U.C.C. § 4-401 defines the lines of liability between the drawer and the payor bank, but does not address the ultimate responsibility for any losses resulting from premature payment. The obvious alternatives are the depository bank, the payee, or indorsers. Since there is no provision in the U.C.C. which could be relied upon by the drawer to place liability on these parties, the drawer would have to sue in tort for the negligent handling of the check or for breach of contract.

1. *Case for Liability of the Depository Bank*

The depository bank has not contracted with the drawer to present the PDC on a particular date, so an action would have to be based upon the negligence of the bank in presenting the PDC prior to its date. If we suppose that the drafters of the revised U.C.C. limited the liability of the payor bank because it is irrational to hold the payor bank responsible for premature payment when it does not have the opportunity to inspect the check and therefore could not have failed to use ordinary care,¹⁷⁰ it stands to reason that a party that does have the opportunity to inspect should not similarly be excluded from liability. The depository bank handles the check and has an opportunity to check the date. Failure to do so could constitute failure to exercise ordinary care¹⁷¹ and thereby justify the placement of liability on the depository bank. For the typical, day to day, over-the-counter transaction, in which a depositor presents a check to a teller with a deposit slip, it does not seem overly burdensome to require the teller to inspect the check for a date and refuse to accept it for deposit if the check is postdated. In such cases the depository bank is negligent for failing to notice the date and should be liable to the drawer.

There are a number of transactions handled by depository banks that do not follow the typical over-the-counter pattern; corporate customers, for example, send thousands of checks at a time to the deposi-

169. See *supra* notes 40-61 and accompanying text.

170. See *supra* notes 86-88 and accompanying text.

171. The definition of ordinary care in the revised U.C.C. § 3-103, *supra* note 165, suggests that the bank's failure to examine may not constitute failure to exercise ordinary care.

tary bank which must be processed for deposit. The burden on the teller/processor to inspect each check for the date is considerable.¹⁷² It may be difficult to demonstrate that failure to inspect the check under such circumstances constitutes negligence,¹⁷³ and the depository bank should not be liable to the drawer under those circumstances.

In many over-the-counter banking transactions, the payee presents a PDC for payment or deposit to the payor bank. The payor bank is also the depository bank on those occasions, and in the former capacity will enjoy the revised U.C.C. § 4-401 limitation on liability. If the drawer has not given written notice to the payor bank, the payor/depository bank will not be liable for premature payment of the check. If drawers are allowed to prevail in tort actions against depository banks for losses due to the bank's negligence in prematurely sending PDCs through the payment system for collection, the result will be that payor/depository banks will be free from liability for the same conduct that depository banks are held responsible.

2. *Case for liability of the Payee*

An action against the payee could be based upon the contract between the drawer and the payee. If the payee agreed to accept the PDC, knowing that it was postdated and either explicitly or implicitly agreed not to present the check for payment until the date on the check, presentment of the check prematurely will be a breach of contract. The following examples will be used to illustrate the possibilities:

Dan Drawer and Paul Payee agreed that Dan would pay for Paul's lawnmower with a check dated two weeks after the purchase. Paul deposited the check into his personal account the day after it was issued and the check was promptly paid. Checks drawn on Dan's account start bouncing all over the place as a result of the depletion of the account.

Since Dan and Paul had agreed to the delayed payment, it became a part of their sales contract and Paul breached when he presented the check for payment prior to the agreed upon date.

Diane Drawer issued and mailed a PDC payable to Veryfine Visa, to make an installment payment on her Visa card. The credit card com-

172. See *supra* notes 131-32 and accompanying text.

173. It probably is not failure to use ordinary care, *supra* notes 148-54. It is unlikely that it will satisfy the standard of negligence that would be applied in a case sounding in tort.

pany had a lockbox operation¹⁷⁴ but the clerk did not look for nor notice the date on the check, forwarded it through the collection process and it was promptly paid. Diane's checks bounced all over the place as a result of the depletion of the account.

In order for Veryfine Visa to be responsible for breach of contract, it would be necessary to demonstrate that Veryfine agreed to delay presentation of the check and breached that agreement. There was obviously no explicit agreement here since Veryfine did not know that the check was postdated at the time it was forwarded for collection. Acceptance of the PDC as payment could be construed as an implicit acceptance of its terms, which of course includes the time of payment. Although such implicit acceptance could establish the basis for breach of contract, the better view is that it does not. Payees should be responsible for breach of contract due to premature presentment of PDCs only when it can be demonstrated that the payee knew of and agreed to such terms. The drawer should not be allowed to lull unwary payees into secret contract provisions and then hold the payee responsible for damages that result from violation of the provisions.

IV. CONCLUSION

The treatment of PDCs in the courts and by the legal system has been fairly consistent, despite the fact that PDCs were nebulously defined in the N.I.L. and the U.C.C. The revised U.C.C. includes a less ambiguous definition; however, the reader still has to rely on more than one section of the code to derive a working definition of a PDC. This is a significant improvement over prior code treatment.

The revised U.C.C. imposes a notice requirement on the drawers of PDCs. Under the revised law, payor banks will no longer be responsible for failure to detect and refuse payment of PDCs prior to their stated date, unless the drawer gives the bank written notice describing the check before the check has been paid by the payor bank. The old rule placing liability on the bank was not in tune with the realities of current technology and ignored the fact that payor banks probably paid PDCs prematurely even though they exercised ordinary care. The new

174. Lock box operations are used by payees who are institutions that handle a substantial volume of checks. The payee sends checks daily to the processing facility where the check is MICR encoded with the amount of the check and the depository bank code. That information is electronically transmitted to the payor bank. If there are sufficient funds in the drawer's account, an electronic transfer is made from the drawer's account to the payee's account.

rule places the responsibility for identifying PDCs on the drawer, who has to beat the payee to the bank in order to prevent premature payment. Since banks already have established procedures for accepting notices for stop-payment orders, PDCs can be accommodated without a significant burden on the payor.

Although the notice provision may be more fair to bankers, it fails to provide protection for consumers. Bankers are shielded from liability for premature payment unless they receive notice, but bankers are not required by the revised U.C.C. to advise their customers of the notice requirement. Forseeably, unenlightened drawers will unwarily issue PDCs and suffer the consequences, which will undoubtedly include returned check charges from the payor bank, closed accounts, and marred reputations with payees when checks are dishonored due to depletion of the drawers' accounts.

The narrow definition of ordinary care in the revised U.C.C. will make it easier for banks to vary the provisions of the U.C.C. in their deposit contracts. It is very likely that banks will either prohibit their customers from issuing PDCs or require that customers give the banks written notice that a postdated check has been issued. Customers who are made aware of such limitations in their contracts may be better off than those who are not advised of the notice requirements and issue PDCs expecting that banks will pay the checks on the stated dates.

The revised U.C.C. is silent on who is liable for losses resulting from premature payment, which leaves room for injured drawers to sue depository banks or payees in contract or tort for the drawers' losses. Depository banks acting negligently, or payees who have contractually agreed to present the PDC for payment on the stated date, may be liable to the drawer for losses.

The revised U.C.C. and the new § 4-401 notice provision does not resolve PDC problems that are so much a part of the current law. The new law does shift the burden of premature payment of PDCs from the banks to the drawers, and forces those drawers to look for new defendants, like depository banks and payees, when the drawers suffer losses due to premature payment.

